

October 31, 2005: new article draft: SOCIAL JUSTICE AND THE BURDEN OF PROOF IN PUBLIC ASSISTANCE ADMINISTRATIVE HEARINGS

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I. Introduction

For low-income public assistance recipients and applicants, the consequences of the state cutting, terminating, or denying welfare benefits can be literally fatal. Loss of critical benefits like Medicaid,<sup>1</sup> TANF,<sup>2</sup> Supplemental Security Income<sup>3</sup>, and Food Stamps<sup>4</sup> can mean hunger, homelessness, disability, or lack of medical care for an individual or family member.<sup>5</sup> The consequences of a loss of benefits for children living in poverty can have a lifelong impact. Statistics show that family poverty leads to lower school performance, higher rates of criminal behavior, and an increased likelihood of

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<sup>1</sup> 42 U.S.C. §§ 1396 et seq. (West 2003 & Supp. 2005).  
Cite Medicaid statute and references.

<sup>2</sup> 42 U.S.C. §§ 601 et seq. (West 2003 & Supp. 2005).  
Cite TANF statute and references.

<sup>3</sup> 42 U.S.C. §§ 1381 et seq. (West 2003 & Supp. 2005).  
Cite SSI statute and references.

<sup>4</sup> 7 U.S.C. §§ 2011 et seq. (West 2003 & Supp. 2005).  
Cite Food Stamps statute and references.

<sup>5</sup> The Economic Effects of Denying Food Stamps to Legal Immigrants in California, California Food Policy Advocates, July 1997, last accessed October 24, 2005  
<http://www.cfpa.net/reports/econ.htm>.

The Effects of SSI & SSD Benefits Termination as Seen in Health Care for the Homeless Projects, National Health Care for the Homeless Council, April 1999, last accessed October 24, 2005  
<http://www.nhchc.org/Publications/ssi.html>.

Evaluating the Effects of Medicaid on Welfare and Work: Evidence from the Past Decade, Employment Policies Institute, December 2000, last accessed October 24, 2005  
[http://www.epionline.org/study\\_detail.cfm?sid=33](http://www.epionline.org/study_detail.cfm?sid=33).

Cite article or reference showing possible devastating effects of loss of public assistance.

substance abuse for children.<sup>6</sup> Fortunately, when a state or federal agency that administers safety net welfare benefits takes such an action against its vulnerable clients, that action can be challenged in an administrative agency hearing to make sure it is correct.<sup>7</sup> In the hearing process, welfare clients can present their case for benefits to an administrative law judge who will determine whether or not the agency was correct in taking away or denying altogether the assistance.

This administrative hearing structure is the primary social justice system for poor people in the United States. For the fair resolution of disputes regarding access to food, shelter, clothing, and health care, low-income clients do not use the system in place for wealthier people in our country – the state and federal judiciary. Rather, the only real civil justice system available and accessible is the administrative hearing process in the executive branch of government. Administrative hearings conducted by administrative law judges and hearings examiners for state and federal agencies that administer social welfare programs decide daily who gets and keeps public assistance benefits critical to the health and welfare of poor families, with little recourse when these benefits are denied by the hearings officer. These executive branch courts decide thousands of cases yearly, yet are rarely scrutinized by the legal community to determine if they are fair.<sup>8</sup>

The primary provider of legal representation for those appealing decisions by welfare agencies has been the legal services corporation funded programs throughout the

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<sup>6</sup> Annie E. Casey Foundation “Kids Count” study. Available at [www.aecf.org](http://www.aecf.org).

<sup>7</sup> Every state must provide for an administrative hearing right for welfare recipients who are denied, terminated or have benefits reduced. Cite to relevant USC, CFR, WACs, and *Goldberg v. Kelly*.

<sup>8</sup> **Maybe: 12 GEOJPLP 13**

Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, Georgetown Journal on Poverty Law and Policy (Spring 2005).

Get any law review articles looking at the fairness of the public assistance hearing process. (So far, can't find any!).

country.<sup>9</sup> However, the grants to provide civil legal services to low-income clients have been drastically reduced over the last two decades,<sup>10</sup> leaving clients virtually without representation in the administrative hearing process.<sup>11</sup> Over the last twenty years, clients having attorney or paralegal representation in these trial-like hearings has decreased from 3 % to only 1 % of appellants (get real figures). Even in the best of times, representation in these hearings has been extremely low.<sup>12</sup> The vast majority of clients who disagree with the state or federal agency's decision to cut, deny or eliminate benefits must face the agency alone, put on evidence, argue the law, and make their own case to the judge pro se. They are on their own in this justice system, and it is the only game in town.

At the same time, the minimal benefits actually available to low-income families have been cut, reduced, or eligibility requirements have increased making the programs yet harder to access.<sup>13</sup> There are simply less services available<sup>14</sup>, even as more people are in need.<sup>15</sup> Welfare reform, budget crises on the state and federal levels, and difficult economic conditions have led to more people in need at the same time fewer benefits are available to meet the need. This combination of few benefits and greater need necessitates a focus on the only process available for those who question the state's

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<sup>9</sup> Get statistics to show who is represented in PA hearings and who represents them.

<sup>10</sup> Show LSC funding reductions over last two decades.

<sup>11</sup> Get statistics to show % of appellants represented at PA hearings.

<sup>12</sup> Get statistics to show highest percentage represented ever.

<sup>13</sup> Get information to show that PA benefits have been cut or restricted over the last 5 years.

<sup>14</sup> Legal services programs have been cut by one third over the last twenty years. Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. 104-134, sec. 504, 110 stat. 1321; 45 C.F.R. sec. 1610 - 1642.

<sup>15</sup> In 2004, the U.S. Census Bureau reported that 12.7% of the population lives below the poverty line. That was the fourth consecutive annual increase in poverty rates. Overall, there were 37 million people living in poverty, up 1.1 million people from 2003. 45.8 million people in the U.S. live without health insurance. See DeNavas-Walt, Carmen, Bernadette D. Proctor, and Cheryl Hill Lee, U.S. Census Bureau, Current Population Reports, P60-229, *Income, Poverty, and Health Insurance Coverage in the United States: 2004*, U.S. Government Printing Office, Washington, DC, 2005.

Get information to show that need for PA has grown.

allocation of those limited benefits. If appellants are essentially on their own in the hearing process, and there are critical benefits at stake in the outcome, potentially involving life and death, then we ought to make sure that the process itself is fair, accurate and errs on the side of eligibility for the benefits.

I propose in this article that the public benefits hearing process is in fact fundamentally unfair to low-income appellants, and that these appellants are almost always at a significant disadvantage in the hearing process. Given that this forum decides cases involving critical needs benefits, determinations that literally can be the difference between sickness and health, hunger and nutrition, homelessness and shelter, I suggest that a safeguard needs to be built into this system to insure a more reliable and fair result for benefits clients. Specifically, I propose that the power imbalance in favor of the state in the hearing process be leveled by shifting the burdens of production and persuasion to the state in all hearings involving the denial, reduction or termination of public assistance, and by employing a “presumption of eligibility” for appealing applicants and recipients.<sup>16</sup>

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<sup>16</sup> Note that I am not proposing that the solution to the inequity of the administrative hearing system for public assistance applicants is that lawyers be provided for all appellants. Representation alone does not solve the inequity of this system. See, Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access To Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham Law Review 969 (2004), arguing that judges should be “active umpires” who would have an obligation to ensure that the parties’ procedural errors do not deprive the court of access to relevant evidence and legal arguments.” Id at 970. I believe that, in the administrative setting, placing the burdens of production and persuasion on the government in public benefits cases accomplishes a “major step toward reasonably equal justice” more simply, fairly, and directly than access to counsel or having a judge that raises relevant legal issues the parties have missed or asks questions to determine admissibility of evidence when a pro se appellant is unable to master the rules. See also, Deborah Cantrell, *JUSTICE FOR INTERESTS OF THE POOR: THE PROBLEM OF NAVIGATING THE SYSTEM WITHOUT COUNSEL*, 70 Fordham L. Rev. 1573 (2004), wherein she postulates that there are three possible ways to irradicate the problem of unequal access to legal representation of the poor in civil cases. “We can provide more free attorneys for the poor. We can alter the legal process so that it is less dependent on attorneys. Or we can alter a poor person's capacity to navigate the system.” Id at 1574. In the administrative hearing setting, which is designed to be less formal and more flexible, with relaxed rules of evidence, the better solution is

Currently, the burden of proof in public assistance administrative hearings is either difficulty to discern, inconsistently applied, or generally placed on the applicant or recipient challenging the agency decision.<sup>17</sup> First we will examine the public assistance hearing system and show why it is I suggest that the burden be standardized in all cases in favor of the welfare benefits appellant. I will show that the policies behind the setting of the burden elucidated by courts and commentators – efficiency, access to information, fairness, risk allocation – all apply with equal force to placing the burden on the state in cases where there is a power imbalance between the government and a citizen, and where critical needs are at stake. I will look at other areas of administrative law where the burden of proof<sup>18</sup> in some form has been placed on the government or its equivalent, rather than on the appellant -- Veteran's benefits hearings, special education hearings, Black Lung health insurance hearings, and Federal Trade Commission hearings – and show why the considerations that dictated placing the burden on the state are equivalent or more compelling in the public assistance arena,. Finally, I respond to potential objections to this change by examining the fiscal, efficiency, and social policy implications of making the state prove a family's ineligibility for welfare benefits in every instance.

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to change the balance of power in the hearing by requiring the state to prove its case for no benefits as both legally and factually correct. By placing the burdens on the state, a poor person's ability to navigate the system improves substantially, because the state would be required to prove each element of its case.

<sup>17</sup> See section X supra pp. ?

<sup>18</sup> By burden of proof, here I mean either the burden of production or persuasion, or a determination that where the evidence is equal, the appellant wins.

## II. **Administrative Hearing system is the primary social justice system for poor.**

When agency actions affect the lives of low-income families, the only place to go for a just resolution of a dispute is not the judiciary, where people with financial means get their disagreements with government resolved, but with the executive branch's own court system – the administrative hearing system. Requests for administrative hearings to resolve disputes in the areas of Supplemental Security Income (SSI), Temporary assistance to Needy Families (TANF), Medical Assistance, Food Stamps, and General Assistance (GAU) far outstrip the number of filings for all civil cases generally in the United States.<sup>19</sup> Full trial-like hearings are actually held in approximately X % of these cases, which finally decide the facts and law of a case for the agency.<sup>20</sup> Only a very small portion of appellants go on to appeal their decisions beyond the administrative hearing into the judiciary.<sup>21</sup>

There are three basic administrative hearings structures in use for appeals of public entitlement benefits: the central panel system, the hearing examiner within the agency, and county level hearings. *Describe each system. Get Research asst. to research each and get figures on the use of each.*

As an example, Washington State uses a central panel system for all public assistance hearings.<sup>22</sup> The Office of Administrative Hearings is set up as a separate

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<sup>19</sup> The Social Security Administration, which administers both the Social Security and Supplemental Security Income benefit, hears and decides more than ten times the amount of cases that the entire federal judiciary hears. 2 Kenneth Culp Davis & Richard J. Pierce, Jr. *Administrative Law Treatise* Sec. 9.10, at 105 (3d ed. 1994) Get statistics to show the number of civil filings in state and federal courts versus the number of PA administrative hearings filings in states and on the federal level. Include SSI and possibly Social Security and Medicare, even though not technically PA.

<sup>20</sup> Stats on % of administrative appeals that go to a full evidentiary hearing.

<sup>21</sup> Stats on % of cases that are appealed to state or federal courts.

<sup>22</sup> RCW 34.12.010 et. seq. (West 2003 & Supp.).

agency to hear cases from the Department of Social and Health Services, which administers the Medicaid, TANF, and Food Stamp programs, as well as 40 other agencies. A panel of ALJs with specific training in public benefits issues hears and decides approximately 20,000 benefits cases per year in Washington.<sup>23</sup> Of these cases, only X % of low-income clients come in to the hearing with any type of representation (number could include friends and relatives as representatives, not legal representatives). Furthermore, the ALJ is, for the most part, the only and final decision maker in the case. In Washington as in most other states, there is no further appeal for either the agency or the client from the findings of fact and conclusions of law made by the ALJ in public assistance eligibility cases, except to file in the judicial branch court system.<sup>24</sup> From there, the only further appeal possible of a negative decision on benefits is to the Washington State Superior Court. For various reasons, including the procedural difficulty of navigating an appeal to the judicial branch, lack of funds to pay an attorney to perfect the appeal, difficulty of perfecting service on the agency, having a pro se appellant up against an assistant attorney general etc., almost no one goes on to appeal a loss of benefits to the court system. A mere (X % ) of all public assistance cases were appealed by clients to Superior Court.<sup>25</sup> *(Maybe talk here more about why no appeals are taken to superior court.)*

Even for those who are fortunate enough to be able to get their case into the judicial branch court system, a review of the factual findings and the ability to add new evidence in the appeal to court is extremely limited. Unless there are rare and

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Cite OAH statute: RCW

<sup>23</sup> Get current stats from Washington OAH.

<sup>24</sup> See WAC 388-02-0215 (4)(5) for list of case types that are appealable to the Board of Appeals and list of case types where the ALJ makes the final agency decision.

<sup>25</sup> Get stats on the % number of PA benefits cases appealed to superior court.

exceptional circumstances, no new trial is held, and no additional evidence is taken.<sup>26</sup> Even the ability to raise new legal issues is limited.<sup>27</sup> Rather, the judicial branch court sits as an appellate court. The judge reviews the written transcript of the administrative hearing, all the exhibits, and the ALJ's written findings of fact and conclusions of law. Unless the public assistance appellant is savvy enough to have put on all the testimony and exhibits necessary for the ALJ to make favorable factual findings, and if the appellant failed to spot and raise all the legal arguments and defenses she could have at the hearing, she will have missed the opportunity and have almost no ability to correct that mistake in court.<sup>28</sup>

*Discuss here exhaustion of administrative remedies requires the appellant to use this system, rather than the independent judicial branch.* Furthermore, public assistance appellants are forced to raise their claims to benefits first in the administrative process rather than the judicial process. The doctrine of exhaustion of administrative remedies requires that all people who dispute an agency action use the entire available administrative hearing process first before filing in court.<sup>29</sup>

In short, the administrative hearing is in reality the only place the public assistance appellant has to challenge the welfare agency's decisions regarding critical needs benefits – to make their case factually and legally. The ALJ is the trial judge and

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<sup>26</sup> See e.g. Washington's Administrative Procedures Act, RCW 34.05.554 (no new legal issues, with some exceptions) and 34.05.558, 562 (no new evidence, with some exceptions).

<sup>27</sup> But see, *Sims v. Apfel*, 530 U.S. 103, 120 S.Ct. 2080 (2000) (A Social Security Disability claimant does not waive judicial review of an issue if he fails to exhaust that issue by presenting it to the Appeals Council in his request for review, because neither the SSA regulations nor statute required issue exhaustion, and the non-adversarial administrative proceeding is dissimilar to court proceedings.)

<sup>28</sup> See Jon C. Dubin, *Torquemada meets Kafka: The Misapplication of the Issues Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum. L. Rev. 1289 (1997) (arguing that issue exhaustion is inappropriate in an administrative setting where critical public benefits decisions are being made and where most appellants are either unrepresented or represented by non-attorneys). Cite federal and state APAs standards on review to show factual findings difficulty to overturn (substantial evidence test).

<sup>29</sup> Cases and law review articles on exhaustion. Explain limited exceptions to exhaustion rule.

jury for the poor. This being the case, it is imperative that advocates look closely at this system to see if it meets the objectives of our public assistance programs and of a fair judiciary. If not, changes must be made to assure that welfare benefits hearings afford citizens a just and fair forum for challenging the government's decisions to take away income, healthcare, or food from a needy families.

## **II. Why PA benefits are so critical and the stakes so high in the hearing**

If the administrative hearing system is, in reality, the only justice system available for challenging public benefits decisions made by state agencies, it is important to look at the fairness of this system to the parties. What exactly is at stake for clients when they have been deprived of public benefits due to a denial of an application, a termination, a denial of services, or an overpayment assessment? One of the primary purposes of public assistance is to supply a minimum source of income to meet the “brutal needs”<sup>30</sup> of those who are too old or disabled to work.<sup>31</sup> Welfare programs like the Supplemental Security Income (SSI), Temporary Assistance to Needy Families (TANF), and state funded

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<sup>30</sup> *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (finding that the due process right includes the right to a fair hearing for public assistance denials, using “brutal needs” to describe access to food, clothing, shelter, income, and health care). “For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.” *Id.* at 264.

<sup>31</sup> Research on the purposes behind public assistance benefits – why do we have them? What are they protecting citizens from? Claire is doing this research.

programs for the disabled like General Assistance for the Unemployable (GAU) provide at least a subsistence level of income to those at or below the poverty level (who are also disabled, old, or have minor children with no other means of support). An agency's decision to deny, reduce, or terminate this source of income can have a devastating impact on low-income families and individuals. Loss of income can lead to homelessness, have severe health impacts, lead to a life of crime, can result in the loss of children by a parent for failure to provide, depression, suicide...*(put in here information on the results of loss of income; and specific true stories).*

Food and nutrition are provided directly to eligible poor in the form of Food Stamps. Congress recognized the critical nature of this benefit in its declaration of policy in the authorizing statute of the Food Stamp Program. The authorizing statute "declare[s] it to be the policy of Congress...**to safeguard the health and well-being of the Nation's population** by raising levels of nutrition. ...Congress finds that the limited purchasing power of low-income households contributes to hunger and malnutrition."<sup>32</sup> The Food and Nutrition Service of the United States Department of Agriculture, the agency that administers the Food Stamp Program, describes the benefit as "the first line of defense against hunger...that provides crucial support to needy households."<sup>33</sup> Food Stamp recipients are made up of the most vulnerable and poor of our populace: 51% are children, 9 % are elderly, and 88% live below the poverty line.<sup>34</sup>

*(Describe here basic objectives of the food stamp program to feed the hungry.)*

Loss or denial of food results in malnutrition and hunger. (describe results)

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<sup>32</sup> 7 U.S.C. §2011 (West 2002).

<sup>33</sup> Food and Nutrition Service, *Food and Nutrition Service Web Site*, at <http://www.fns.usda.gov/fsp/> (last modified July 26, 2005).

<sup>34</sup> *Id.*

The other crucial benefit provided by public assistance is health care coverage. The primary needs based public assistance program that covers healthcare is the Medicaid program.<sup>35</sup> Under Medicaid, eligible adult recipients receive a required package of benefits called mandatory services that includes emergency services, hospitalization, ambulance, nursing services, rehabilitation including occupational and physical therapies, prescription medications, and skilled nursing home care (*check on these and others*).<sup>36</sup> Most states also provide recipients with optional services that include home health coverage, durable medical equipment, personal care, case management, medical transportation, eye care, dental, and hearing aides.<sup>37</sup>

Eligible children receive an even broader range of medical care than adults. Under the Early Periodic Screening, Diagnosis and Treatment Program (EPSDT), children get regular check-ups and all medically necessary follow up treatment for any conditions found during the screening.<sup>38</sup> (*check on all this*).

The denial or termination of any one of these medical services can be devastating. The stated purpose of the Medicaid Program is to furnish “**medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services.**”<sup>39</sup> Therefore, the loss of this benefit could mean that needy children, elderly and disabled people would be unable to afford medically required services. Without surgery or a prescription drug, a Medicaid recipient can become disabled or die. A denial

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<sup>35</sup> 42 U.S.C. §§ 1396 et seq. (West 2003 & Supp. 2005).

<sup>36</sup> 42 U.S.C. § 1396 (West 2003 & Supp. 2005). See also, Denise Rozwarski, Note, *Discounts on Prescription Medication for the Uninsured Working Middle-Class: New State Programs do not Conflict with the Purpose of the Federal Medicaid Statutes*, 21 J.L. & Com. 147 (2001).

<sup>37</sup> Medicaid optional services cites.

<sup>38</sup> EPSDT program cites.

<sup>39</sup> 42 U.S.C. § 1396

of home personal care services can result in a person being unnecessarily institutionalized in a nursing home. A person denied eye care or hearing aide services loses the ability to see or hear. Someone denied dental care can suffer in pain, lose teeth, and forgo nutrition. Without an appropriate wheelchair, a paraplegic may lose the ability to be mobile at all. The anxiety and fear of losing medical benefits itself can cause lasting mental health problems or even death.<sup>40</sup>

These possible results are not just hypothetical. They are already happening every day, as benefits are cut in state after state.<sup>41</sup>

**IV. Why Public Assistant appellants in administrative hearings are always at a significant disadvantage in the hearing process.**

In hearings where low-income clients challenge the loss of these important benefits, the power of the government is overwhelming. Without the advantage of adding a favorable burden of proof and presumption of eligibility similar to the protections given to criminal defendants and civil litigants in commitment or juvenile dependency proceedings, public assistance appellants are always at a significant disadvantage in the administrative hearing system when faced with the hegemony of the state. Even in central panel states where the agency hearing the case is separated from the original agency deciding the case, there are huge barriers for appellants to overcome if they are to prevail in their attempt to obtain or maintain their benefits. Because central

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<sup>40</sup> Studies showing that worry about loss of benefits or even going into a hearing can cause severe emotional harm.

<sup>41</sup> See story of Michele, whose initial erroneous denial of Medicaid resulted in the hospitalization of her daughter with pneumonia, huge medical bills for her treatment, creditors calling the family day and night threatening jail time if she did not pay off the bills, and eventual garnishment of her wages to pay the medical debt. Washington State Civil Legal Needs Study: Executive Study p.2. See also story of Christine, p. 39 Legal Needs study. *Also, see declarations/testimony for U.S. Senate Democrats being put together by Families USA on Medicaid cuts.*

panel systems appear to be the most favorable to appellants because the ALJs are housed in a separate agency than the agency denying benefits, I will use the example of Washington State's hearing system to illustrate the institutionalized weakness of appellants. For even in this "independent" hearing system, the odds of prevailing are heavily stacked against the person seeking redress.

First, as has been shown, the vast majority of public assistance appellants appear pro se.<sup>42 43</sup> It goes without saying that representation of oneself, even if you have an advanced degree and adequate financial resources, is a daunting proposition.<sup>44</sup> When your own or your child's income, assets, healthcare and well-being are on the line, the emotional barriers to articulating a clear case and to proving up facts can be formidable. It is at best difficult to keep a clear head and an objective view of the strengths and weaknesses of a case and how to overcome problems with the case. Even a lawyer who represents himself "has a fool for a client."<sup>45</sup>

Further, it is a myth that the administrative hearing process itself is easy for appellants to navigate by themselves.<sup>46</sup> It is scary, intimidating, and complex process that involves court like procedures, public speaking, motion practice, entry of exhibits,

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<sup>42</sup> Deborah L. Rhode, in her book *Access to Justice*, (2004), states that, in civil proceedings, most low- and middle-income people lack any affordable access to legal services, and that "about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals remain unmet." "Only one Lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans. Id at 5.

<sup>43</sup> The Washington State Civil Legal Needs Study, September 2003, found that 87% of low-income households experience a civil legal problem each year, that 8% experience a public benefits problem, and that 88 % of low-income people face their legal problems with help from an attorney. See Executive Summary at p.2.

<sup>44</sup> See Karl Monsma and Richard Lempert, *The Value of Counsel: 20 years of Representation Before a Public Housing Eviction Board*, 26 LSOCR 627 (1992), showing that the more legally formal the hearing, the more likely representation helped the client prevail. Cite other studies of the effect of lawyer representation (e.g. In England at welfare tribunals cited in Monsma article?)

<sup>45</sup> Any articles on problems with self representation?

<sup>46</sup> Cite to articles/law saying that administrative hearing system is designed to be more relaxed and informal setting. NAALJ journal articles?

objections to evidence, and an understanding of complicated laws and procedures.<sup>47</sup> All of this must be mastered by appellants in front of an adversary who knows the law and the process and a judge who expects the parties to be able to put on a case.<sup>48</sup>

Public assistance clients are at a disadvantage by virtue of their poverty, advanced age, or disability -- the very reasons they are in need of assistance in the first place. Low-income appellants have trouble perfecting and then arguing their own appeals because of their lack of money. They have difficulty finding and paying for reliable transportation to hearing sites, finding and paying for childcare for their young children, and getting leave from jobs to go to hearings or meet with the agency's hearing representatives.<sup>49</sup> Because of difficulty with childcare, low-income clients often must bring their children to the hearing, and focus on limiting the child's behavior rather than presenting their case in the best light.<sup>50</sup> Poverty can mean lack of good nutrition, bad or no housing, and other stresses making representation of legal and factual issues at a hearing yet more difficult.<sup>51</sup>

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<sup>47</sup> Cite to APA procedures on admission of evidence, discovery, exhibits, direct and cross, etc. And, training materials for DSHS and legal services advocates on administrative hearing preparation.

<sup>48</sup> Cite to SS cases chastising appellants for failure to provide full medical evidence. *Vazquez v. Vargas* note ? supra. Courts agree that attorney representation in the context of establishing eligibility for SSI and Social Security Disability can be critical to obtaining benefits. *See Frank*, 924 F. Supp. at 427–28:

The potential benefits of having counsel at a benefits proceeding are well recognized. Indeed, the heightened duty placed on the ALJ by this Circuit is an attempt to compensate for the disadvantage of proceeding without counsel. . . . The high rate of remand may well be a function of the fact that, “[u]nder our system of adjudication, no hearing officer (or judge) will ever be an equivalent substitute for a lawyer devoted exclusively to a party’s interests. Cases such as the present one will repeatedly arise until the legal services bar translates into action the now commonplace observation that agency cases are usually won or lost at the agency level.”

*See also* *Guzman v. Califano*, 480 F.Supp. 735, 737 (1979).

<sup>49</sup> How do we know this?

<sup>50</sup> Do ALJ interviews on this? Social work or social science literature?

<sup>51</sup> *Id.*

People in poverty are statistically much more likely to be at an educational disadvantage as well.<sup>52</sup> Lack of education when dealing with sophisticated legal eligibility issues in front of an ALJ who is a lawyer and a department representative who is often college educated and trained on legal representation and on the programs at issue sets clients up for failure in the hearing process before the hearing even begins.<sup>53</sup>

Clients with physical or mental disabilities qualifying them for public benefits have enormous added challenges in the hearing process.<sup>54</sup> The inability to see or hear adequately affects the ability to both obtain and give information to the hearing officer or agency. Persons with mental retardation or other developmental disabilities may be completely unable to comprehend their hearing issues, let alone represent themselves at the hearing. Yet, they are required to do just that, because there is no established right to counsel in even the most clear cut cases of inability to put on a case.<sup>55</sup> (*look at the civil gideon stuff and arguments as to why some low-income clients need attorney representation*). In hearings where the very issue is the amount or scope of the appellant's disability, it is that disability itself that prevents the person from putting on a case. Clients with mental illnesses like schizophrenia, depression, and bi-polar disorder who are being denied or terminated from disability benefits are forced to prove the elements of law and fact for their own cases. (*Explain why this may be impossible – again civil gideon stuff here. Also, look at the Needs Special Assistance Program*).

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<sup>52</sup> Get stats from Stephanie for clients on public assistance and their educational status -- % that are high school drop outs, etc.

<sup>53</sup> Get literature on what the PA client looks like; sociological studies; clinical teaching literature; legal services priority setting; legal services back up centers' stats --- Stephanie is getting.

<sup>54</sup> Literature on people with disabilities in the hearing process?

<sup>55</sup> But see Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 *Seattle Journal for Social Justice* 609 (2004), arguing that the Americans with Disabilities Act requires an attorney accommodation in the court or administrative hearing process when a litigant's disability prevents him or her from accessing the court system.

Appellants who do not speak English are at a special disadvantage in the hearing process.<sup>56</sup> Even assuming excellent translation services, unrepresented non-english speaking clients can have difficulty understanding the system they are in, the law that applies, and how they can present their case. In Washington State, the Office of Administrative Hearings refuses to translate into appellants' native language the administrative hearing decision and any notices regarding the hearing, opting instead to have the decision read to them in their language over the phone.<sup>57</sup> It is virtually impossible to figure out how to appeal a decision which includes several findings of fact and conclusions of law and cites to applicable statutes and regulations if the only way to review the decision is orally over the phone. This would be impossible for an attorney to do, let alone a lay person with no legal training and the inability to speak or read the language of the decision.

Public assistance appellants have disadvantages in the hearing process beyond those of poverty, disability, age, or language. They are disadvantaged by the state always having representation of its viewpoint in the hearing. Unlike low-income appellants, the government always has the benefit of being represented in the hearing process.<sup>58</sup> For example, in Washington State, the Department of Social and Health Services is represented in all public assistance administrative hearings by either a trained "fair hearing coordinator," an in-house attorney/program manager, or by the Attorney General's Office. Even at the lowest level of representation, with the agency using non-attorney employee representatives, these fair hearing coordinators are sophisticated in their ability to represent their client agency. They receive training on the fair hearing

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<sup>56</sup> (*statistics on what % of public assistance applicants/recipients are non-english speaking*).

<sup>57</sup> Cite to policy. Also check to see how other jurisdictions' hearing offices handle this.

<sup>58</sup> Show how. Also note that the ALJ represents the government position in SSI hearings.

process, development and presentation of evidence, arguing the law, and prehearing motion practice.<sup>59</sup> The fair hearing coordinators are often agency social workers who have worked within the Department for many years and know the ins and outs of public benefits. Having done numerous hearings on a daily or weekly basis, they know the judges who hear the cases and are very familiar with the hearing format. Unlike their public assistance pro se opponent, they also know how to access the statutes, regulations and internal manuals governing benefits programs. The Department's representative can easily acquire the prior decisions of the particular ALJ assigned to the case, or other hearing decisions on the issue going to hearing, and use those cases in the argument. On the other hand, the appellant has no access to the law in this area, and no ability to get decisions of the ALJs since they are neither precedential nor published. *(anything written on the non-precedential nature of admin decisions, or the inability to research decisions, and impact on fairness?)*.

Public benefits law is complex, often compared to the difficulty of tax law, so the inability to find the law, let alone comprehend it, is a significant obstacle to low-income appellants being able to argue their cases.<sup>60</sup> The failure to publish precedential decisions means the appellant is both unable to access interpretations of the law by hearing officers, and that there is no consistent interpretation of law for appellants to rely upon in forwarding their case. On the other hand the Department knows which ALJs tend to decide which way on particular issues, and can use that information to its advantage in presenting their case.

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<sup>59</sup> Cite to trainings and training manuals.

<sup>60</sup> Cases on Medicaid complexity with judge quote (Jim Brown Twen site) and also add technology deficit of low income families (technology bill of rights).

The state fair hearing coordinators know the agency experts on the case or issue, and can easily interview them and have them present at the hearing as witnesses for their side of the case.<sup>61</sup> The department can and does bring to hearing its own doctors, dentists, nurses, and program managers who are paid to testify as experts at hearings as to why the appellant is not disabled enough or the requested service is not medically necessary for the applicant or why program rules prohibit eligibility. The appellant must figure out how to cross examine these state employed experts on their own, with no expert of their own to counter the opinion put forth. Finding and hiring expert witnesses who can testify to medical disability of the applicant, the need for medications or equipment, the financial value of assets, etc. is virtually impossible for low-income appellants in the hearing process. For the unrepresented public assistance appellant, this kind of knowledge and access by the agency representative can be an insurmountable obstacle to winning at the hearing.

In contrast, in the federal hearing system governing appeals of denials or terminations of SSI, the agency is theoretically not represented at all in the case. The administrative law judge, who is an employee of the Social Security Administration, is in the strange dual role of both the judge and the agency representative.<sup>62</sup> That structure presents additional barriers to the appellant facing the judge as prosecutor. *Put more here about problems for appellants in the SSA hearing system where there is no agency representative on the other side. See if there are law review articles on this.*

In contrast to first blush impressions, it is the government, not the client, that has the best access to the appellant's own records, files and evidence in a public assistance

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<sup>61</sup> (cite to *ex parte* communications with agency experts not involved in the case – APA.)

<sup>62</sup> Cite to regs/law showing there's no agency rep at SSI hearings.

appeal. It is within the unique ability of the state to gain access to appellants' information. With signed releases, which are a condition precedent to receiving public benefits, the state can access through computer cross-checks client bank records, real property, credit reports, debt, medical records, tax returns, and employment records.<sup>63</sup> For example, the agency has the ability to cross-check its computers with the Internal Revenue Service, Social Security, and Employment Security to obtain tax returns and employment records. The state has the staff and resources to access these records critical to eligibility.

For low-income clients to obtain the information they need to prove eligibility requires the ability to travel to banks, doctors' offices and former employers for records. It may require computer access. It may require a level of sophistication in tracking down information that many appellants simply do not have. Also, finding information, developing medical evidence and expert testimony, and keeping track of documentary evidence for presentation at a hearing requires organizational skills and the resources to track down information that may be beyond the means and skills of many clients in hearing status. On the other hand, the agency has both the capability and the resources to do just that in presenting its case.

The state is in a superior position to low-income appellants for another important reason – it writes the very rules that determine who gets benefits and who does not.<sup>64</sup> It also has the ability to change its rules when it believes an ALJ has misinterpreted them in

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<sup>63</sup> Cite to regulations allowing access; articles describing government access to client information in bank, tax, employment records.

<sup>64</sup> Agencies have broad authority under enabling legislation and under the statutes authorizing the various public assistance programs to write regulations setting out eligibility requirements. Cite Fed statute and regs and APA.

granting eligibility.<sup>65</sup> This ability to write and amend eligibility rules is advantageous to the state for more than just the obvious reasons that the state can control the outcome via rulemaking. In Washington State, agency regulations are the primary source of law that must be applied first by the hearing judge, taking precedence over higher contrary authority in statutes, caselaw, and even the state and federal constitutions.<sup>66</sup> This requirement that judges apply the lowest level of law, agency promulgated regulations, as the highest level of authority, is unique to the public assistance hearing appellant in American jurisprudence. In no other setting is the litigant essentially barred from getting the benefit of favorable statutes, case law and constitutions in making their arguments to the primary judge deciding their case.<sup>67</sup> If a rule applied against an appellant in terminating, reducing or denying public assistance is itself unconstitutional or violates the authorizing public assistance statute, even assuming an unrepresented person could figure that out, he would be unable to make that challenge successfully at the administrative level.

This means that the agency controls the state of the law in the hearing, and the appellant has no way of challenging illegal regulations at the hearing level. The only way a public assistance appellant can challenge a clearly illegal regulation is by appealing his/her case all the way through the administrative process up to the court system, and there arguing the issue. Even assuming the unrepresented client could figure out the legal

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<sup>65</sup> Cite APA.

<sup>66</sup> WAC 388-02-0220. Check situation in other states and on federal level to see if this is unique to Washington.

<sup>67</sup> *(research to see if this is true, if it's been challenged elsewhere, whether ALJs can overturn regs in other settings, or at least use higher authority to apply without overturning reg).*

issue and navigate the hearing process, which assumes a great deal, most public assistance clients never get beyond the hearing itself in challenging the agency decision. The administrative hearing is, in practice, the only place of redress for these clients. The ALJ's inability to overturn an illegal rule or to use higher authority in making a legal determination when the state's regulation plainly deals with the issue seriously inhibits public assistance appellants from getting a fair day in court.

Finally, the client is disadvantaged by the culture that permeates administrative agencies and employees, including most significantly, the culture of the agency of Administrative Law Judges. The culture in place always pushes the ALJ toward a decision affirming the state's position denying eligibility. I am talking here about the lack of true "independence" of ALJs in making their decisions for state and federal agencies.<sup>68</sup> Perhaps the most palpable proof of agency power over the ALJ decision making process is the employment relationship of the ALJ to the agency. In the federal system as well as the majority of state hearing systems<sup>69</sup>, the ALJ is directly employed by the very agency whose decision is being challenged by the low-income appellant. For example, Social Security Administration judges constitute the vast majority of all federal ALJs. They are directly employed by the agency that has determined that the appellant is not eligible for or has been overpaid Social Security disability or retirement benefits, or that their termination from these critical benefits was appropriate. Yet the "independent" decision maker hearing their case receives their paycheck from that agency, is housed in the agency, works directly with the agency's management and expert staff, and is

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<sup>68</sup> Cite to articles talking about the lack of independence of agency ALJs.

<sup>69</sup> 24 States currently have central panels. Find out if this is true, and what percentage of benefits cases is heard by the central panel even in those states. Find out if any central panel retains final decision making on benefits cases. Check with NAALJ for stats.

supervised by agency employees.<sup>70 71</sup> In commenting upon the need for a central panel agency on the federal level, senior United States District Court Judge John L Kane, Jr. stated, “I think that having the agency or department that litigates before an administrative law judge exercise the power to appoint, promote or assign is the same as having the fox guard the hen house. Even the most benign fox can be expected to make supper every now and then.”<sup>72</sup>

Even in the central panel state, the administrative hearing office is still a state agency often funded by the very agencies whose decisions they are overseeing. In Washington State, the Office of Administrative Hearings is a “revolving fund” agency that gets its funding for hearings directly from the Department of Social and Health Services. The number of judges hearing cases, the support staff, even the type of computers, fax machines and furniture are governed by the amount of money that can be obtained from the agency whose decisions are being reviewed. This funding relationship is known to the ALJs, and I believe has more than just a subtle impact on the decision making of the judges, particularly in cases where the appellant’s legal position is not a clear cut winner. (*Stephanie is getting info on the culture of alj corps and on alj independence to insert here*).

Furthermore, the perception among ALJ staff is that too many reversals of agency decisions will cause trouble in the future. This is the perception even among the most

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<sup>70</sup> Cites to statute and regs governing SSA ALJ corps. See also, **90 CNLLR 769**  
Cornell Law Review  
GENERAL BIAS AND ADMINISTRATIVE LAW JUDGES: IS THERE A REMEDY FOR SOCIAL SECURITY  
March, 2005

<sup>71</sup> **Association of Administrative Law Judges, Inc. v. Heckler** 594 F.Supp. 1132  
D.C.D.C., 1984. (In the 1980’s, Social Security judges who found too often in favor of people appealing the agency’s denial of disability benefits were disciplined by the Social Security Administration for being too “pro-appellant”. The Association of Administrative Law Judges sued the agency for this practice, and lost.)

<sup>72</sup> Kane, “Public Perceptions of Justice: Judicial Independence and Accountability”, Vol. XVII Journal of the National Association of Administrative Law Judges No. 2 p. 203, 207.

appellant oriented ALJs. This perception is in fact a reality, especially when one looks at the state's ability to affidavit the judges that it thinks will not rule favorably toward the state's position. In Washington State, when either the Department believes it cannot have a fair and impartial hearing from the hearing officer, it can get rid of the first judge assigned without stating any specific reason for its belief.<sup>73</sup> This affidavit procedure has been used by the state to both move ALJs who the Department believes are more "appellant oriented" off of the DSHS caseload, and to send the message to all OAH judges that you could be next if we do not like your decisions. It does not take many affidavits for the judges to receive the message that you better find in the agency's favor unless the appellant has a bullet proof case. In the late 1980s, the state began consistently affidavitting one ALJ who it believed found too often for appellants. This judge had urged an appellant via a letter to appeal a favorable decision of his that had been overturned by the Department's board of appeals. Because this ALJ's main caseload was hearing DSHS appeals, the state's refusal to let him hear these appeals effectively denied him all employment. Although this matter was eventually worked out with the agency by OAH, a clear message was delivered to the ALJ corps that too many favorable decisions for public assistance appellants could result in your removal from the caseload by the state's use of the affidavit process.

In Washington State, as is the case in most states, the administrative agency, the Department of Social and Health Services, has the right to review some decisions made by the Office of Administrative Hearings ALJ. Even though the central panel agency hears the case and takes the evidence, it only issues an "initial decision". That decision is

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<sup>73</sup> WAC 388-02-XXX; RCW 34.04 ? (get affidavit procedure cites. Find out whether or not this exists in other states or on the federal level.)

then appealable back to the Department by either party.<sup>74</sup> So, even when appellants prevail before the independent ALJ, the Department can and frequently does appeal that decision back to itself for review. While in Washington State, the standard of review for the administrative decision has restricted the ability of the review judge to overturn factual findings, the review judge reviews the de novo the legal conclusions of the ALJ. Further, most states (*check this out*) as well Washington's administrative procedures act give little if any deference to the ALJs factual findings. As a result, even if the public assistance appellant prevails at the independent administrative hearing, the agency still has the power to appeal that decision back to itself for a full review of both the factual findings and the legal conclusions of the initial decision.

The psychological as well as actual advantages this process bestows on the agency over the appellant cannot be denied. The unrepresented claimant, with little or no resources, who is fortunate enough to win at the administrative hearing, still faces the uphill battle of an appeal by the agency back to itself. The perception of this unfair advantage on the part of the agency to review its own decision in the face of a loss at the independent level appears wholly unjust to appellants. How can it be just if the independent ALJ decision can be appealed back to the loser? Appellant in this situation

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<sup>74</sup> Recently, the Department, based on budgetary considerations, limited the jurisdiction of its Board of Appeals to reviewing Initial Decisions of ALJs in public assistance cases only to Medical Assistance denials of equipment and services and Developmental Disabilities cases. ALJ decisions in all other public assistance cases, including TANF, GAU, and Food Stamps, are now the final decision of the Office of Administrative Hearings. This limiting of review authority by the Department was supported and championed by legal services advocates, including the author, because of the perception and reality that favorable ALJ decisions were being reversed on appeal back to the agency. However, it appears anecdotally that the lack of Board of Appeals review of substantial portions of the public assistance caseload has resulted in ALJs overturning fewer agency decisions by holding appellants to an even higher standard of proof of their cases. ALJs appear to be more afraid to make "risky" decisions in favor of granting benefits because there is even more pressure from the state to deny when there is no opportunity to review the decision again.

may forego even attempting to respond to such an appeal by the agency when she feels there is no possibility of a fair result<sup>75</sup>.

For these as well as other reasons,<sup>76</sup> the public assistance appellant faces a nearly insurmountable uphill battle to prevail in the administrative hearing process. I believe that the burden of proof is so high on appellants that they must prove virtually beyond a reasonable doubt their eligibility for benefits in order to win at hearing. A process that gives the state so much power and the appellant so little when so much is at stake must be examined to see if there are ways to make the procedure more fair and just. Otherwise, the very integrity of this justice system is at stake. This is why I am proposing a radically different approach to the burden of proof in this setting, as a way of balancing out the power inequities and providing benefits to likely eligible clients.

#### **V. What are the current articulated burdens of production and persuasion in public assistance administrative hearings?**

At the start, it must be said that there is almost universal confusion over the meaning, definitions and standards applied to burdens of proof in both civil and criminal cases, and in the administrative forum as well. As Justice O’Conner recently noted, “The term “burden of proof” is one of the “slipperiest member(s) of the family of legal terms.” Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the “burden of persuasion,” i.e., which party loses if the evidence is closely balanced, and the “burden of production,” i.e., which party

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<sup>75</sup> Find out if there are statistics on the failure of appellants to respond to appeals by the agency back to itself. See Schwartz article page 215. Agencies are not limited to just appellant power of review over the ALJ decision. Allentown Case 349 US 358 (1955). 5 USC section 557 (b). Federal APA Rule on appeal.

<sup>76</sup> For example, the rules of evidence are relaxed in the administrative hearing, and hearsay is admissible if it is the type of evidence “a reasonably prudent person would rely upon in the conduct of his affairs.” RWC 34.05. 461??. This means the agency can admit all types of potentially damaging evidence of appellants’ past conduct or its impressions of this appellant that would never get in if the hearing were in the judicial branch.

bears the obligation to come forward with the evidence at different points in the proceeding.”<sup>77</sup> Legal commentators have long been critical of the incoherent treatment of burdens by the courts.<sup>78</sup> My proposal is to clarify and standardize the burdens of production and persuasion in public assistance hearings, and to set a higher level of proof on the government than is currently required in most other civil cases.<sup>79</sup> As shown below, the burdens in these appeals are perhaps more confused than in civil cases generally, leading to results that harm the most at risk in our culture and the least able to understand or meet these burdens.

Currently, in public assistance cases, the burdens of proof are either difficult to ascertain, clearly favor the government, or are not articulated at all in many types of cases. Even if pro se appellants understood the significance of the assignment of burden of proof to the possibility of winning, they would be hard pressed to find who has the burden and at what level without a sophisticated legal research plan. Even with such a plan, it may be impossible to find the legal burden.

Administrative Law Judges rarely even discuss the burden of proof in the hearing or in their written decisions on public benefits cases. (*how to show this, although I know it to be true having read so many decisions?*) In ALJ training manuals the burden of

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<sup>77</sup> Schaffer v. Weast, 126 S.Ct. 528, 533-534 (2005), citing 2 J. Strong, McCormick on Evidence § 342, p. 433(5<sup>th</sup> ed. 1999).

<sup>78</sup> See e.g., Allen, Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform, 76 NW. U.L. Rev. 892 (1982); Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L.Rev. 307(1920); Hecht & Pinzler, Rebutting Presumptions: Order Out of Chaos, 58 B.U.L. Rev. 527 (1978); Stumbo, Presumptions—A View at Chaos, 3 Washburn L.J. 182 (1964). NOTE: I got these citations from Elizabeth Mertz, The Burden of Proof and Academic Freedom: Protection For Institution or Individual?, 82 Nw. U. L. Rev. 492 (1988) note 21. I need to get these articles and also update the footnote with more current articles. Claire – can you do this?

<sup>79</sup> See proposal in section X supra at \_\_\_\_.

proof is not discussed at all.<sup>80</sup> The pamphlets supplied by both the Office of Administrative Hearings and the Department of Social and Health Services to pro se appellants fail to mention the terms “burden of proof,” let alone define it.<sup>81</sup> The Department’s own regulations on fair hearings procedures describe what the burden of proof is, but fail to tell who carries it.<sup>82</sup> In the Washington State regulations describing the individual public assistance programs, there is no designation of who carries the burden of proving eligibility.<sup>83</sup>

In short, who has the burden of production, who has the burden of persuasion, and what level of proof is required and by whom is more the stuff of mythology than certainty in the public assistance administrative hearing process. This alone puts appellants at a large disadvantage, because they do not know what they are up against going into the hearing, and that their decision maker’s unarticulated view of the burden may be the deciding factor in their case. If the decision maker does not clearly know or articulate the burdens, than he or she can resort to commonly held beliefs about who must prove what, based on their own biases or understandings. Those biases can tend toward assuming that public assistance appellants must prove each and every element of their case challenging the agency decision regarding their benefits, whether or not they are denied applicants for

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<sup>80</sup> See e.g. Torem article and Griggs article, on file with the author, or Fair hearings pamphlets at [www.oah.wa.gov](http://www.oah.wa.gov).

<sup>81</sup> See [www.oah.wa.gov](http://www.oah.wa.gov) glossary of terms and “Your fair hearing rights” pamphlet.

<sup>82</sup> WAC 388-02-0475 and WAC 388-02-0480. “Standard of proof refers to the amount of evidence needed to prove a party’s position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.” [Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0480, filed 9/1/00, effective 10/2/00.]

<sup>83</sup> See e.g. TANF regulations at WAC § 388-400, WAC § 388-404, Medicare/Medical Assistance at WAC § 388-517, GAU at WAC § 388-410, and Food Stamps at WAC § 388-444, where no burdens of proof are assigned.

benefits or are being terminated by the agency from benefits for which they have previously been found to be eligible.

The extent to which the burden of proof is articulated at all depends on the type of benefit at issue and the type of action being taken by the agency against the applicant or recipient of benefits. First, we will look generally at how burdens of proof are assigned at the administrative hearing level, and then look specifically at the assignment of proof in the individual benefits programs.

The Administrative Procedure Act on both the federal<sup>84</sup> and state<sup>85</sup> levels provides that, “except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”<sup>86</sup> The proponent of a rule or order is the “person who brings forward a matter for litigation or action, the moving party, or the party asserting the affirmative of an issue.”<sup>87</sup> Therefore, the proponent is virtually always the person challenging the agency action in the administrative hearing process, not the government agency.<sup>88</sup> This is true in all cases, whether or not the appellant is a well resourced business challenging the Environmental Protection Agency’s promulgation of air quality rules with large firm attorney representation or a pro se mentally disabled person appealing the Social Security Administration’s denial of disability benefits. The APA makes no distinctions in burden of proof based on the relative lack of power of the appellant or the critical nature of the benefit being denied.

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<sup>84</sup> The Federal Administrative Procedures Act is found at 5 U.S.C. sec. 556 (d).

<sup>85</sup> See e.g. the Washington State APA at RCW 34.05 et seq. . **GET other states’ APAs as examples here.**

<sup>86</sup> See Federal APA, 5 U.S.C. sec. 556 (d). See also, Washington State APA at RCW 34.05.570: *unless another statutory provision states otherwise*, “the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.”

<sup>87</sup> 2 Am. Jur. 2d Administrative Law § 354

<sup>88</sup> But see *Newport News Shipbuilding and Dry Dock Co. v. Loxley*, 934 F.2d 511 (4<sup>th</sup> cir. 1991). **(this was cited in 2 am. Jur 2d Admin. Law § 354 for the proposition that “the fact that a party requests an administrative hearing does not make that party the proponent of the issue.” I haven’t had a chance to look it up to see the distinction.**

Unless otherwise stated in law, the APA provides the default rule that the person requesting the administrative hearing challenging the validity of the agency action must bear the burden of proof.<sup>89</sup> If a state or federal APA applies to the public assistance program's administrative hearings,<sup>90</sup> this default position seems to be that, without a contrary statute or court ruling on burden of proof, a public assistance appellant must prove that the state's action was invalid in both a termination, where the agency has already found the appellant to meet its eligibility requirements, or an initial denial of benefits.

The U.S Supreme Court, in the case of Department of Labor v. Greenwich Collieries, 512 U.S. 267 (1994), interpreted the Federal APA's section that places the burden on the proponent of a rule or order. That case involved a review of a Department of Labor grant of Black Lung benefits to a miner denied that coverage. The DOL had promulgated a regulation that does some of what I am advocating for in the context of Black Lung benefits: the "true doubt rule" shifted the burden of persuasion to the party opposed to the benefits claim (typically the mining company). Under the "true doubt rule", Black Lung Benefits Act (BLBA) claimants who challenged a denial of this health benefit in an administrative hearing would win the claim when the evidence is evenly balanced. The court majority held that this rule violated the APA sec 7 (c)'s burden of proof requirement, and for the first time held that the burden of proof as used in the act meant "burden of persuasion," not just the burden of production (i.e., the burden of going

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<sup>89</sup> See 2 Am Jur 2<sup>nd</sup> AdminLaw sec. 355., and Hazardous Waste Treatment Council v. U.S. Environmental Protection Agency, 886 F.2d 355 at 366, (D.C. Cir. 1989).

<sup>90</sup> Whether or not the FAPA or state APAs apply to a particular public benefit hearing is in question. It may depend on if the benefit is a federal only program (SSI, Food Stamps) or a state/federal mix (Medicaid, TANF). Claire is researching.

forward with evidence).<sup>91</sup> The Supreme Court held that the APA is “a statute designed to introduce greater uniformity of procedure and standardization of administrative practice among diverse agencies whose customs and departed widely from each other,” and that this uniformity is compromised if agencies are free to create presumptions. “Under Sec. 7(c), when the evidence is evenly balanced, the benefits claimant must lose.”<sup>92</sup>

This case appears to hold, for the first time, that for agency hearings governed by the APA, only a statutory change allocating the burdens of production and persuasion to the government in a particular program would result in the agency having the burden of proof. Absent a statute firmly placing the burden on the government, it appears that public benefits recipients and applicants must prove their eligibility in every instance, even if Congress intended the program to be remedial and that the agency resolve doubts about eligibility in favor of the benefits recipient.<sup>93</sup>

It is possible that an administrative agency could, through its rulemaking authority, reallocate the burden of proof in an agency hearing if the statute authorizing the benefits program was silent as to who held the burden.<sup>94</sup> A regulatory allocation of

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<sup>91</sup> Burden of persuasion means “the obligation to persuade the trier of fact of the truth of a proposition.” And burden of production means “the obligation to come forward with evidence to support a claim.” Greenwich Colliers p. 272. Prior to this court’s decision, burden of proof in the APA was interpreted to mean only the burden of coming forward with evidence to support a claim, not the burden of persuasion. See, e.g., NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (Sec. 7(c) determines only the burden of going forward, not the burden of persuasion” Id at 404, n.7; Environmental Defense Fund, Inc. v. EPA, 548 F.2d, at 1013 (“burden of proof (sec 7(c) casts upon the proponent is the burden of coming forward with proof, and not the ultimate burden of persuasion”).

<sup>92</sup> Id at 281.

<sup>93</sup> In Justice Souter’s dissent, joined by Justices Blackmun and Stevens, he points out that Congress intended the Black Lung Benefits Act to be remedial in nature and that agency hearings examiners are to resolve doubts about eligibility in favor of the coal miner. Citations in opinion omitted. Id. At 296.

<sup>94</sup> Bunce v. Secretary of State, 239 N.W. 2d 372 (1999). (Check this cite for this proposition. Got it from am jur.) See also, Schaffer v. Weast, 546 U.S. \_\_\_, 126 Sup. Ct. 528 (2005), leaving open the question of whether states may override the default rule that the burden falls on the party seeking relief through statutes or regulations assigning the burden to the government. Id at 537.

the burden of proof to the government would still have to be consistent with the legislative intent of the program.<sup>95</sup>

If and when a state or the federal APA applies to public assistance hearings, it appears that the default burden of proof would govern in the administrative setting. Given the holding of *Greenwich Collieries* that absent a statute or clear regulation changing the burden of proof, the APA's § 7(c) requirement that benefits applicants bear the burden prevails, it is necessary to look at what, if any, statutes, regulations or case law define burdens in public assistance cases. As it turns out, the law is haphazard in its attempt to define the burdens in the various types of cases. The one area where there is some clarity in law regarding burdens is the issue of whether or not a person is "disabled" enough to need assistance, for those programs that require a disability test. And, there is also some case law with respect to who carries the burden distinguishing between an appeal of an outright denial of benefits versus a termination of someone already on a program. But, for issues of financial eligibility for benefits not related to disability, for example, whether or not a person meets the financial requirements of a program, there is no specific guidance at all about who carries the burden and at what level.<sup>96</sup> Further, there is no guidance as to who has the burden of persuasion with respect to when the parties have a different legal interpretation of the meaning of a particular unclear statute, regulation, or case. (except see deference to agency interpretations cases...)

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<sup>95</sup> "(A)ssuming, arguendo, that the Department has the authority to displace § 7(c) through regulation—this ambiguous regulation does not overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision." *Greenwich Collieries* at 271.

<sup>96</sup> Under the Federal Administrative Procedures Act, case law has consistently defined the level of proof needed to carry the burden of persuasion at an administrative hearing as a "preponderance of the evidence." See e.g. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981); 9 J. Wigmore, *Evidence* §2498.

The main area where there is specific guidance on the burden of proof is with respect to a determination of disability for purposes of initially qualifying for SSI or Medicaid benefits. Title XVI of the Social Security Act (Act) provides for payment of disability benefits to indigent persons under the Supplemental Security Income program. 42 U.S.C. § 1382 (2003). Under the Act, “disability” is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months...” 42 U.S.C. § 1382c(a)(3)(A) (2003). The Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.”<sup>97</sup>

Once disability is established, and the claimant also shows he is within the resource and income limitations of SSI (\$2000 or less in savings, and under \$560 per month in income), a person receives benefits in the form of a monthly income and health insurance. Their income will increase to approximately \$560 per month, and they will receive Medicaid coverage of their health care costs, including prescription drugs, with no co-payment or deductible. For a disabled person, the combination of income and health care can be the difference between life and death. If the benefits claim is denied by the Social Security Administration based on its determination that the claimant’s

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<sup>97</sup> 42. U.S.C § 1382c(a)(3)(B) (2003).

condition does not meet its disability definition, there is an appeal process in place. Who carries the burden of proof of disability at the administrative hearing can mean the difference between having the denial overturned and the claimant obtaining benefits, or having the denial affirmed.

Who has the burden of showing in an administrative hearing that the definition of disability is met when a person is denied this income and health care benefit by the federal government? Proof of disability is difficult and follows a five step sequential process.<sup>98</sup> Under this process, the applicant for benefits bears the burden of proving virtually every step, including the severity of his/her impairments, that the disability will last for a year or more, and that the impairment prevents him/her from doing any work he/she has done in the past.<sup>99</sup> Only after each of these elements are proven by the applicant does the burden then switch to the government to show that the claimant could perform some work that is available in the national economy.<sup>100</sup>

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<sup>98</sup> 20 C.F.R. § 416.920 (2003) - Evaluation of Disability for 42 U.S.C § 1382.

<sup>99</sup> Gray v. Heckler, 760 F.2d 369, 371, 9 S.S.R.S. 262, 264, CCH ¶ 16,051 (1st Cir. 1985)

"It is well settled that a claimant seeking disability benefits has the initial burden of proving that her impairments prevent her from performing her former type of work. Goedermote v. Secretary of Health and Human Services, 690 F.2d 5, 7 (1st Cir. 1982); Pelletier v. Secretary of Health, Education and Welfare, 525 F.2d 158, 160 (1st Cir. 1975)."

<sup>100</sup> Lancellotta v. Secretary of Health and Human Services, 806 F.2d 284, 16 S.S.R.S. 7, CCH ¶ 17,076 (1st Cir. 1986)

"The inquiry as to whether Lancellotta was disabled focused on whether there existed, 'in significant numbers,' 42 U.S.C. § 1382c(a)(3)(B), other jobs in the regional or national economy that he could nonetheless perform. See 20 C.F.R. § 416.920(f). The burden of showing the existence of other jobs was on the Secretary. Sherwin v. Secretary of Health and Human Services, 685 F.2d 1, 2 (1st Cir. 1982)."

See also, Vazquez v. Secretary of Health and Human Services, 683 F.2d 1, CCH ¶ 14,794 (1st Cir. 1982); Gagnon v. Secretary of Health and Human Services, 666 F.2d 662, CCH ¶ 17,912 (1st Cir. 1981) Mimms v. Heckler, 750 F.2d 180, 185, 8 S.S.R.S. 123, 128, CCH ¶ 15,667 (2d Cir. 1984)

"The burden of proving disability is on the claimant. Gold v. Secretary of HEW, 463 F.2d 38, 41 (2d Cir. 1972), 42 U.S.C. § 423(d)(5). However, once the claimant has established a prima facie case by proving that his impairment prevents his return to his prior employment, it then becomes incumbent upon the Secretary to show that there exists alternative substantial gainful work in the national economy which the claimant could perform, considering his physical capability, age, education, experience and training. Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980)."

- Step One: Claimant bears the burden of showing that he is not working.
- Step Two: Claimant bears the burden of showing that he has a medically severe impairment or combination of impairments.
- Step Three: Impairment must meet the duration and requirement of impairment conclusively presumed to be disabling. The claimant carries this burden.
- Step Four: Claimant bears the burden of showing that his impairment prevents him from doing past relevant work.<sup>101</sup>
- Step Five: Agency bears the burden of showing that claimant is (1) able to perform work (2) available in the national economy.

A claimant makes a *prima facie* case that she is disabled if she can meet the requirements of steps 1, 2, and 3 or 4. The burden of proof then shifts to the agency to meet requirements of step 5 to show claimant is not disabled. Although the Supreme Court has said in dictum that the burden shift in step 5 includes both availability of work in the national economy as well as the ability for claimant to perform the work<sup>102</sup>, Circuit courts remain divided on the scope of the shifted burden.<sup>103</sup>

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<sup>101</sup> Gray v. Heckler, 760 F.2d 369, 375, 9 S.S.R.S. 262, CCH ¶ 16,051 (1st Cir. 1985)

"In Gonzalez Perez v. Secretary of Health, Education and Welfare, 572 F.2d 886 (1st Cir. 1978), we declined to remand even though there were no findings or analysis by the ALJ that related the claimant's psychological disorder to the capabilities necessary to perform her prior work. We stated:

'... a claimant must establish that he can no longer perform his prior vocation before the government is obligated to prove that alternative employment is available for a person in claimant's condition. It is not sufficient to assert some general, functional disability and then leave it to the government to present evidence as to the practical consequences of the disability in terms of the requirements of the claimant's prior work. That is the claimant's responsibility ...' Id. at 888."

<sup>102</sup> Bowen v. Yukert, 482 U.S. 137, 107 S.Ct. 2287 (1987)

<sup>103</sup> In Bowen v. Yukert, 482 U.S. 137, 107 S.Ct. 2287 (1987) Can the Sec'y of Health and Human Serv deny a claim for SS disability benefits on the basis of a determination that the claimant does not suffer from a medically severe impairment that significantly limits the claimant's ability to perform basic work activities? (Short answer is yes.) Sec'y has the authority to require claimants to make threshold showing that their "medically determinable" impairments are severe enough to satisfy the reg stds. If the claimant is unable to show **severe** impairment or combo of impairments, Sec'y need not offer evidence that claimant can perform other work.

Mays v. Bowen, 837 F.2d 1362, 1364, 20 S.S.R.S. 450, 452 (5th Cir. 1988)

"Once he has shown that he is unable to perform his previous work and that his disability has lasted or may be expected to last at least twelve months, the burden shifts to the Secretary to show that there is other

Many courts have required SSI applicants to either put on all the evidence available on the issue of disability or lose the case.<sup>104</sup> Other courts have placed a higher duty on the agency when an appellant appears pro se to develop the record at the hearing.<sup>105</sup> These courts have recognized the limited ability of appellants to make the

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substantial gainful employment available that the claimant is capable of performing.... If the Secretary adequately points to potential alternative employment ... the burden then shifts back to the claimant to prove that he is unable to perform the alternative work."

Price v. Heckler, 767 F.2d 281, 284, 10 S.S.R.S. 212, 215, CCH ¶ 16,182 (6th Cir. 1985)

"In our circuit, when a claimant cannot perform his previous work, the burden shifts to the Secretary to bring forth evidence of available employment compatible with claimant's limitations. Vaughn v. Finch, 431 F.2d 997, 998 (6th Cir. 1970)."

See also, Cole v. Secretary of Health and Human Services, 820 F.2d 768, 18 S.S.R.S. 43, CCH ¶ 17,390 (6th Cir. 1987); Shelman v. Heckler, 821 F.2d 316, 18 S.S.R.S. 88, (6th Cir. 1987)

Halverson v. Heckler, 743 F.2d 1221, 1225, 7 S.S.R.S. 22, 26, CCH ¶ 15,546 (7th Cir. 1984)

"A claimant has the **burden of proof** to establish an inability to return to her past relevant work, while, if the claimant meets that burden, the Secretary then has the burden to prove that there is some other substantial gainful employment available that the claimant can perform. Whitney v. Schweiker, 695 F.2d 784, 786 (7th Cir. 1982)."

Frey v. Bowen, 816 F.2d 508, 512, 17 S.S.R.S. 417, 421, CCH ¶ 16,267 (10th Cir. 1987)

"The claimant bears the burden of proving a disability within the meaning of the Social Security Act. 42 U.S.C. [sect ] 423(d)(5). However, once a showing is made of disability preventing the claimant from engaging in prior work activity, the burden shifts to the Secretary to show 'that the claimant retains the capacity to perform an alternative work activity and that this specific type of job exists in the national economy....' If the Secretary does not meet this burden, the claimant is disabled for purposes of award of disability benefits."

<sup>104</sup> See e.g. Vazquez Vargas v. Secretary of Health and Human Services, 838 F.2d 6, 9, 20 S.S.R.S. 464, 467, CCH ¶ 17,905 (1st Cir. 1988)

"Claimant argues, however, that she never understood the need for additional medical evidence and that the ALJ failed in his duty to her, a pro se claimant.... We reject claimant's contention that the ALJ did not do enough to help her adequately develop the record. Among other things, the ALJ asked claimant why she could not work, when her condition first occurred, and when the doctors had told her she was disabled. In view of claimant's answer dating disability to 1981, we think the ALJ adequately explored matters. Nor was the ALJ remiss in not obtaining further medical records. The ALJ told claimant the record was not adequate and asked her to supply some identification so that he might send for any more records. Claimant did not comply."

<sup>105</sup> Evangelista v. Secretary of Health and Human Services, 826 F.2d 136, 142, 18 S.S.R.S. 711, 717, CCH ¶ 17,493 (1st Cir. 1987)

"We have long recognized that social security proceedings 'are not strictly adversarial.' Miranda v. Secretary of HEW, 514 F.2d at 998. Accordingly, we have made few bones about our insistence that the Secretary bear a responsibility for adequate development of the record in these cases. See Deblois v. Secretary of Health and Human Services, 686 F.2d 76, 80-81 (1st Cir. 1982); Currier v. Secretary of HEW, 612 F.2d 594, 598 (1st Cir. 1980). Understandably, this responsibility increases when the applicant is bereft of counsel. *Id.* See also, Bomes v. Schweiker, 544 F.Supp. 72, 76 (D. Mass. 1982)."

See also, Ramirez v. Secretary of HEW, 528 F.2d 902, 903 (1st Cir. 1976) (per curiam) (right to counsel, voluntarily waived, will not furnish grounds for disturbing denial of benefits absent showing that claimant was in any way misled, or that [the] hearing was in any way unfair').

case for disability without the assistance of counsel, and thus have placed a greater duty on the ALJ to make sure the record is complete and that the government provide the needed documentation to adequately assess disability.

At least one court distinguished between the proof of disability burden in Social Security and the needs based SSI program. The third circuit held that, if the ALJ believed that evidence of disability was inconclusive or unclear, it was the judge's responsibility to secure whatever evidence was needed to make a sound determination. "The statutory language in Title II (SS) which places the burden of proof as to the medical basis of a finding of disability on the claimant at all times is simply not present in Title XVI (SSI). See 42 U.S.C. sect. 423(d)(5)(1976)." <sup>106</sup> Because in the Social Security/SSI appeal setting there is no representative present for the Social Security Administration, the ALJ is essentially also representing the government in the hearing. The Third Circuit here puts the burden on the government to provide enough evidence to make a clear determination of eligibility, and does not let the agency rest on its laurels when a claimant is unable to put on enough evidence himself to prove disability.

Once a client is found eligible for SSI benefits, one would think the burden of proof would change to the government when it next attempts to terminate those benefits.

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Livingston v. Califano, 614 F.2d 342, 345, CCH ¶ 16,693 (3d Cir. 1980)

"This circuit has recently announced in a case remarkably similar to the instant case, standards that the ALJ must meet in developing the record. In Dobrowolsky [606 F.2d 403 (3d Cir. 1984)] we stated that an ALJ should 'assume a more active role when the claimant is unrepresented' and thus has a 'heightened duty of care and responsibility in such instances.'"

Early v. Heckler, 743 F.2d 1002, 1008, 7 S.S.R.S. 6, 12, CCH ¶ 15,541 (3d Cir. 1984)

"In evaluating Early's testimony, it is significant that he was unrepresented by counsel. As we stated in Dobrowolsky v. Califano, 606 F.2d at 407, when a claimant is unrepresented the ALJ has a 'duty to develop the record with special care.'"

<sup>106</sup> *Ferguson v. Schweiker*, 765 F.2d 31, 36, 10 S.S.R.S. 114, 118 (3d Cir. 1985)

Only one circuit, the ninth circuit Court of Appeals, in *Patti v. Schweiker*, 669 F.2<sup>nd</sup> 582, 587 (9<sup>th</sup> cir. 1982) has followed that reasoning in finding that once the Secretary has determined that a claimant is disabled, there is a presumption of continuing disability. Benefits cannot be terminated absent a showing of substantial improvement in the appellant's condition by the government. In *Patti*, the court found itself "unable to discern any reason why the familiar principle that a condition, once proved to exist, is presumed to continue to exist, should not be applied when disability benefits are at stake."<sup>107</sup> However, other circuits have come to the opposite conclusion, requiring clients to re-prove their disability once again upon termination even though the government has already found their condition to be disabling. "The burden of establishing continuing disability is on the appellant. ... (T)he standards to be applied by the Court in reviewing a termination of benefits do not differ materially from those applied in reviewing a denial of benefits. ... In a case in which benefits have been terminated, as in a case in which benefits have been denied, the burden of proving disability is on the claimant, not on the Secretary."<sup>108</sup>

As has been shown, even with all the case law, statutes, and regulations discussing the burden of proof on the issue of disability for SSI/Medicaid cases, it still can be difficult to ascertain the burdens in these appeals. The issue of who bears the burden of proof can depend on which the circuit in which the appellant resides, or the particular ALJ hearing the case. It is yet more difficult to determine the burden with respect to cases that involve issues other than disability, like financial eligibility, medical

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<sup>107</sup> *Id.* at 583.

<sup>108</sup> *Myers v. Richardson*, 471 F.2<sup>d</sup> 1265, 1267-1268 (6<sup>th</sup> Cir. 1972). See also, *Gist v. Secretary of Health and Human Services*, 736 F.2d 352 (C.A. Mich. 1984), holding there is no presumption of ongoing disability solely based on a state agency's previous finding of disability.

necessity, or household composition. In cases involving agency denials, reductions or terminations of TANF, Medicaid, Food Stamps, and Supplemental Security Income (SSI), based on financial ineligibility, family composition, lack of medical necessity of equipment or services, or failure to participate in a job search the burden is de facto placed always on the low-income appellant.

Where case law can be found, most state courts hold that an applicant or current recipient of benefits must prove each and every element of eligibility. For example, in an unpublished opinion involving continuing financial eligibility for Food Stamps, the Washington Court of Appeals found that, even in a termination case, “the party challenging the agency’s decision bears the burden of proving the decision is invalid.”<sup>109</sup> In Alabama, the state court held that their Medicaid agency’s determination of ineligibility is given a “presumption of correctness.”<sup>110</sup> Applicants for benefits have consistently been required by state courts to both come forward with all financial evidence regarding their eligibility and to prove they are within the eligibility requirements.<sup>111</sup> A few courts have found that the burden of proof shifts to the state to

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<sup>109</sup> *Yurtis v. Dep’t of Soc. and Health Servs.*, 110 Wash.App. 1060, 2002 WL 398488 (Wash. Ct. App. 2002) NOTE: UNPUBLISHED OPINION, SEE RCW 2.06.040.

Yurtis reported nonexempt income over \$2,000 and had her food stamp benefits terminated. The court cited the APA provision, RCW 34.05.570(1)(a), placing the burden on the person challenging the agency decision.

<sup>110</sup> *Alabama Medicaid Agency v. Norred*, 497 So.2d 176

Ala.Civ.App.,1986 Circuit court must give medicaid agency's determination of noneligibility presumption of correctness. Code 1975, § 41-22-20(k).

<sup>111</sup>See, e.g. *Wagner v. Sheridan County Social Services Bd.*, 518 N.W.2d 724, N.D.,1994. (Although lien on property could reduce value of property, Medicaid applicant had burden of presenting reliable information as to value of her assets, for purposes of determining her eligibility for Medicaid benefits notwithstanding transfer of certificates of deposit (CD) made for purpose of rendering applicant eligible for benefits, where applicant had pledged her interest in CDs as security for son's debt, and CDs were then applied to satisfy debt.) NDCC 50-24.1-02; *Fischer v. State Dept. of Social and Rehabilitation Services*, 21 P.3d 509

Kan.,2001. (Determination of which party would bear burden of proof regarding classification of resources in connection with determination of Medicaid eligibility was a question of law, and therefore, Supreme

show ineligibility once an appellant puts on a prima facie case showing he meets the eligibility requirements of the program.<sup>112</sup> One state court in Colorado held that the burden switches to the state to prove ineligibility by a preponderance of the evidence

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Court's review was unlimited.) Social Security Act, § 1901, as amended, 42 U.S.C.A. § 1396; K.S.A. 39-708c; Kan.Admin. Regs. 30-6-106, 30-6-107; *Ptashkin ex rel. Fliegelman v. Department of Public Welfare*, 731 A.2d 238, Pa.Cmwlth.App.,1999 (Applicant fully bears burden of proving eligibility for medical assistance. 62 P.S. § § 442.1, 1404(a); 55 Pa. Code § 178 (App. A)); *Matter of Welfare of Sayles*, 407 N.W.2d 414

Minn.App.,1987, (Department of Human Services' rule providing that trust fund is subject to personal property limitations mandated under applicable state law unless it can be affirmatively demonstrated that such fund could not be made available to meet individual's medical needs placed burden of proof on recipient to demonstrate affirmatively that fund in question could not be made available).

*Martin v. Com., Dept. of Public Welfare*, 514 A.2d 204, Pa.Cmwlth.App.,1986 (Burden is on medical assistance applicants to determine their eligibility; however, applicants must be advised of all services and benefits.); *Jackson v. Missouri Dept. of Social Services*, 706 S.W.2d 611 Mo.App.E.Dist.,1986 (Claimant who applied for medical assistance benefits had burden of proving her resources did not exceed \$2,000.); *Williams v. Scott*, 647 S.W.2d 115, Ark.,1983 (Burden is on applicant for Medicaid benefits to prove eligibility to the satisfaction of the administrative agency; there is no burden on the agency to investigate applicant's claim and introduce rebutting proof. 42 U.S.C.A. § 1396 et seq.); *Madeley v. Bates*, 391 N.Y.S.2d 689, N.Y.A.D. 2 Dept.,1977, (Applicant for medical assistance had burden of proving her eligibility for such assistance.); *Godown v. Department of Public Welfare*, 813 A.2d 954

Pa.Cmwlth.App.,2002, (An applicant bears the burden of demonstrating eligibility for medical assistance. 55 Pa.Code § 178.104(e)(3); 62 P.S. § 1404(a).); *Axilrod v. State, Dept. of Children and Family Services*, 799 So.2d 1103

Fla.App.4.Dist.,2001, (No presumption of validity attaches to conclusions of law, including the determination of the proper standards to apply, in reviewing Medicaid disability benefits claims.);

*Steinberg v. Department of Public Welfare*, 758 A.2d 734

Pa.Cmwlth.App.,2000, (An applicant bears the burden of establishing eligibility for medical assistance.); *Wahl v. Morton County Social Services*, 574 N.W.2d 859, N.D.,1998, (Applicant for Medicaid benefits must prove eligibility.)

<sup>112</sup> See e.g. *Salinas v. Canyon County*, 786 P.2d 611, Idaho.App.,1990 (Medical indigency benefits applicant bears burden of proving medical indigency; however, that duty is not absolute. Once medical indigency benefits applicant presents at least prima facie showing of medical indigency, burden of proof shifts to board of county commissioners to rebut applicant's claims. I.C. § § 31-3405, 31-3406. Medical indigency medical benefits applicant established prima facie showing that her home in Texas was exempt as an available resource, in determining entitlement to benefits, due to Texas homestead law, and since board of county commissioners failed to rebut that claim and applicant had no other resources to pay medical bill, county was liable for medical indigency benefits, even though applicant failed to attend hearing and make full disclosure of assets. Vernon's Ann.Texas Const. Art. 16, § 50; I.C. § § 31-3401 to 31-3411, 31-3501 to 31-3515A.); *Johnson v. Minnesota Dept. of Human Services*, 565 N.W.2d 453, Minn.App.,1997, (General rule applicable to civil cases that prima facie case shifts burden of going forward to opposing party applies to administrative proceeding to determine eligibility for medical assistance funds for health service.)

once an applicant for benefits appeals to the judicial system after losing in the administrative hearing process.<sup>113</sup>

In appeals of terminations from public assistance benefits that get all the way through the administrative process up to the courts, some state courts have held that, when terminating a recipient, the state then bears the burden of proving a recipient is no longer financially eligible.<sup>114</sup> Other courts have held that a current recipient still must prove all elements of eligibility, even when being terminated by the state.<sup>115</sup>

Whether or not the burdens, to the extent they are even articulated by the courts, find their way to the administrative hearing judge when a client appears unrepresented, is

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<sup>113</sup> *Ohlson v. Weil*, 953 P.2d 939, Colo.App.,1997. (On Medicaid applicant's appeal from adverse ruling by state Department of Health Care Policy and Financing, Department bears burden, by preponderance of evidence, to establish basis of ruling being appealed. 10 Colo.Code Regs. § 2505-10.

<sup>114</sup> *Raitport v. New York City Dep't of Soc. Servs.*, 260 A.D.2d 223, 688 N.Y.S.2d 74 (N.Y. App. Div. 1999)

It appears that NY's Social Services Law § 209 [1](b) deems those properly receiving SSI as having met the eligibility criteria. The court thus requires agency to show otherwise to terminate.

*Kegel v. State*, 830 P.2d 563  
N.M.App.,1992

Where Human Services Department sought to terminate child's health care benefits on ground that child was beneficiary of "Medicaid qualifying trust," burden of proof was upon Department to show that child was no longer eligible for benefits by showing that trust fund in question was Medicaid qualifying trust, and thus "available" income. Social Security Act, § 1902(k), as amended, 42 U.S.C.A. § 1396a(k).

*State, Dept. of Social Services v. Beckner*, 813 S.W.2d 353  
Mo.App.S.Dist.,1991

State Department of Social Services, as claimant against estate of Medicaid recipient to recover sum allegedly expended on recipient's behalf, had burden of proof and estate was not required to adduce evidence to defeat the claim.

*Simmons v. Van Alstyne*, 410 N.Y.S.2d 400  
N.Y.A.D. 3 Dept.,1978

Burden of proof when denying or discontinuing medicaid benefits is not on petitioner, but on local agency in first instance.

*Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349  
Fla.App.1.Dist.,1977

Burden of proof at reclassification hearing was upon the Department of Health and Rehabilitative Services, not upon recipients of medicaid benefits seeking continued assistance.

<sup>115</sup> *Jones v. Bureau of TennCare*, 2002 WL 1343223

Tenn.App.,2002 (State Medicaid plan, TennCare, did not have the burden of establishing a change of circumstances before it could terminate coverage for home health services; its only burden was to establish that the services were not medically necessary.)

questionable at best. It is my experience that the burden of proof is rarely discussed by ALJs in the administrative hearing, even in the rare instance when the client is represented. Given the varied interpretations by courts, the paucity of law generally on the issue, the critical nature of public assistance benefits to the provision of food, income, shelter and medical care to low-income families, and the importance of the assignment of burden of proof to the outcome of cases, it is time to provide a clearly articulated burden that favors public assistance applicants and recipients.

## **VI. My proposal for the Burden of Proof**

I am proposing that this crazy quilt of burdens in the public assistance arena be abandoned in favor of a clearly articulated burden in every case. I would create a standardized burden of production and persuasion that consistently favors benefits applicants and recipients in the administrative hearing process.

I am proposing that the state's position be put to the test by mandating that the agency prove both factually and legally each and every element of the appellant's ineligibility for benefits. In order to prevail at hearing, the state would have to come forward with facts that prove that the claimant is not financially qualified for the benefit program, not medically in need of the service applied for, or had been overpaid benefits. An appellant could prevail at the hearing without putting on any case if the agency failed to meet its burden of coming forward with evidence and law proving ineligibility.

With regard to proof of facts, I would first require that all public assistance applicants and recipients fully cooperate with the agency in obtaining any and all information necessary to establish eligibility or ineligibility for benefits, or to maintain current benefits.<sup>116</sup> Appellants would be required to sign all releases of information for the agency to obtain medical and financial information from banks, doctors, employers, etc. They would also be required to notify the agency as to where their assets and income are located, who are the relevant medical providers and employers, and who are the people and agencies that have information that can help establish whether or not eligibility criteria are met. Full cooperation by the applicant for benefits is essential, but once given, the burden of tracking down and presenting this evidence would be on the agency, not the low income client.

I would require a different and higher level of proof than is currently required of the state in public assistance hearings. Rather than requiring the tradition burden in civil cases, that the state prove by a preponderance of the evidence the appellants' ineligibility,<sup>117</sup> I would require that the state meet the intermediate standard of proof of ineligibility by "clear, cogent, and convincing evidence." (stopped here – need to add in

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<sup>116</sup> Public assistance applicants and recipients are currently required to cooperate fully in the obtaining of information on eligibility and continuing eligibility. See e.g. 20 C.F.R. § 416.200 which requires applicants as well as recipients of SSI to "give [the agency] any information we request and show [the agency] necessary documents or other evidence to prove that you meet [eligibility] requirements;" 20 C.F.R. § 416.912 requires applicants to prove eligibility by providing necessary documentation for the agency to reach conclusion of disability. 20 C.F.R § 416.916 again requires applicant and recipient to co-operate in furnishing evidence of disability. Failure to co-operate results in agency rendering decision based on information available. 20 C.F.R. § 416.918 subjects applicants and recipients to examination or test to determine disability. Wash. Rev. Code § 74.04.300 (2003) – It shall be the duty of recipients of benefits to notify the department of changes that would result in ineligibility for benefits (both cash and food stamp).

<sup>117</sup> See e.g. *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (standard of proof in APA hearing is "preponderance of the evidence"); *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981); and *J. Wigmore*, at § 2498.

all the cases/research from Mertz article on higher standards of proof in administrative hearing setting, and why preponderance doesn't cut it). The preponderance of the evidence test only matters in the rare case that the evidence is in equipoise, that is where both the state and the appellant have provided exactly equal evidence of the proposition in question. Under a clear, cogent and convincing evidence requirement, the state would have the higher burden of proving all of the critical elements of its case. Weinstein et al., supra note 24, at 1158. The representative probabilities of the preponderance of evidence standard and the evidence standard of "beyond reasonable doubt" are 50+% and 95+%, respectively. Id. at 1157-59.

However, for terminations from or reductions in current benefits, I would place a higher burden on the state given that it has already previously found the client eligible for the benefit. The state would be obliged to show by "clear, cogent, and convincing evidence" that the appellant no longer is eligible for benefits. *(Define here clear, cogent, and convincing evidence test and how it would work. Research definition) (Explain here why I would differentiate between terminations/reductions and all other pe cases wrt b of p. And, why I would have a different and lesser standard than in criminal cases. Talk with Debbie about this. This is because recipients of benefits have come to rely on the benefits and that they have been correctly assessed by the state for them. Recipients should not be put through the obligation of having to reprove eligibility again and again once found eligible.)* This would make it much more difficult for agencies to terminate benefits for clients it has previously found eligible. It would have to prove to the judge in a clear and convincing manner that there was an improvement in the recipient's condition

warranting a termination from disability or reduction in medical benefits, or that the recipient's financial or other circumstances have changed. Absent such a convincing showing that the appellant is no longer eligible, he would remain on benefits.

Just as there is a "presumption of innocence" in the criminal setting, I would place in law a "presumption of eligibility" for benefits that must be overcome by the state to deny or terminate an applicant. (*Bio: research on the meaning of a presumption of innocence in criminal context, and meaning of a presumption in the civil context*). A presumption is defined as "the existence of a fact (presumed fact) be taken as established when certain other facts (basic facts) are established unless and until a certain specified condition is fulfilled. (Once the presumption arises) the opponent (of the presumption) must produce evidence to rebut the presumed fact or ... (the fact finder) is instructed to find in favor of the presumed fact."<sup>118</sup> Here, the existing fact of eligibility for the applied for benefit would be taken by the ALJ as established unless and until the state produced some evidence to rebut eligibility. Once that evidence is produced, the presumption of eligibility is gone, but the state still would have to persuade the judge of their position either by a preponderance of the evidence in an application case, or by clear, cogent and convincing evidence in a termination/reduction case.

With regard to persuading the ALJ about what the correct legal interpretation of statutes and regulations where there is a dispute that effects the outcome of a case, in public assistance cases only I would eliminate the deference given to an agency's interpretation of its own statutory/regulatory scheme. Further, I would require judges to interpret unclear regulations against the drafter and in favor of the public assistance client. Because agencies have control of the regulatory process, they should not benefit

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<sup>118</sup> 1 Handbook of Fed. Evid. Sect. 301.1 (5<sup>th</sup> edition).

when their regulations are poorly drafted or fail to consider the full implications of their wording. By interpreting unclear regulations against the agency, it would force the state to respond to administrative hearing decisions it believes wrongly interpreted their regulations by fixing and clarifying them using the regulatory process. Unlike regulation in almost every other area, public assistance applicants and recipients do not have consistent lobbyists and advocacy groups who serve as agency watchdogs over regulatory action, at least not to the extent that businesses, environmental groups, and healthcare providers and consumers do.<sup>119</sup> This lack of consumer oversight can result in sloppy rulemaking and vague regulations that provide little guidance to recipients and judges as to the parameters of eligibility. This situation is exacerbated by allowing interpretations that favor what the agency claims it meant post hoc. Requiring administrative judges to recognize the legal interpretation most favorable to applicants for benefits when a regulation does not cleanly address the issue will result in better and more precise drafting and a more consistent interpretation for appellants. Interpreting regulations against the drafter also helps to even out the power imbalance experienced by appellants who are unrepresented and often unable to make sophisticated legal arguments to overcome the current deference to agency interpretation.

*Put here real case examples to show how the favorable burden might have effected real cases appealed.* Changing the burden of persuasion in public assistance administrative hearings will sometimes determine the outcome of the case. In Black Lung benefits cases, the True Doubt Rule “ensures that the employer will win ... only

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<sup>119</sup> LSC funded legal aid programs are restricted in their ability to lobby and to comment on proposed regulations on behalf of clients. The ability to monitor welfare agencies’ regulatory actions is limited at best. See LSC restrictions cite.

when its evidence is *stronger* than the claimant's.”<sup>120</sup> In *Bonessa v. United States Steel Corp.*, a miner was found eligible for Black Lung benefits when “the (ALJ) noted that the contradictory nature of the x-ray evidence established ‘true doubt’ as to the existence of pneumoconiosis and resolved that doubt, as is proper, in favor of (the claimant).”<sup>121</sup>

In *Schaffer v. Weast*, the Supreme Court heard an administrative appeal of a denial of special education benefits to a disabled child by a Maryland school district. The ALJ found that the evidence was in equipoise, and therefore whoever carried the burden of persuasion would lose. The issue on appeal to the Supreme Court was who carries the burden of persuasion when the statute was silent on the subject. Although the court majority held that the party appealing the decision carries the burden (in almost all cases, that would be the parents), it found that the situation where the evidence was equal would be very rare.<sup>122</sup>

*Maybe use the case examples in the introduction to show how their cases might have gone with the new burden. Or, use cases that were appealed where the result might have changed. E.g. Vazquez Vargas v. Secretary of Health and Human Services, 838 F.2d 6, 9, 20 S.S.R.S. 464, 467, CCH ¶ 17,905 (1st Cir. 1988)*

*"Claimant argues, however, that she never understood the need for additional medical evidence and that the ALJ failed in his duty to her, a pro se claimant....*

*We reject claimant's contention that the ALJ did not do enough to help her adequately develop the record. Among other things, the ALJ asked claimant why she could not work, when her condition first occurred, and when the doctors had told her she*

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<sup>120</sup> *Mullins Coal Co. of Va. V. Director, Office of Workers' Compensation Programs*, 484 U.S 135, 156 n.29 (1987) (emphasis in the original).

<sup>121</sup> *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 730 (1989).

<sup>122</sup> *Weast* cite plus see discussion of case *supra* in section on policies behind burden.

*was disabled. In view of claimant's answer dating disability to 1981, we think the ALJ adequately explored matters. Nor was the ALJ remiss in not obtaining further medical records. The ALJ told claimant the record was not adequate and asked her to supply some identification so that he might send for any more records. Claimant did not comply."*

PUT in HERE section on policies behind the burden of proof:

### **Policies behind burden of proof**

Any attempt to change the burden of proof in public assistance hearings through legislation, rule making, or court decision must be justifiable<sup>123</sup>, at least in part, by the theoretical underpinnings of burden assignment. What are the policies forwarded by assigning the burdens of production and persuasion to one party over another? Does the consistent placement of these burdens on the government in public assistance administrative hearings further these goals? I will show that all of the policy considerations warranting the assignment of these burdens demand that it be placed on the government to even out the power imbalance favoring the state in the hearing process and to make sure that the risk of an incorrect decision is born by the public, not by the most vulnerable members of our society: the poor, the disabled, the children, the elderly.

The policies behind allocation of the burden of proof have generally been framed in three categories – procedural efficiency, substantive policy, and procedural fairness. First, as we have seen, most courts are satisfied with allocating the burden of proof based upon the “long-established procedural rule that he who asserts the affirmative of an issue

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<sup>123</sup> Efficiency and social justice rationales also apply here. See supra section X.

has the burden of proving it.”<sup>124</sup> This rule is based on the notion that advancement of the status quo is presumed to be a legally superior argument to change.<sup>125</sup> Reinforcing this premise is the presumption of constitutionality afforded to statutes.<sup>126</sup> This presumption effectively operates to assign the burden to the party challenging the constitutionality of a statute and is justified on the grounds that legislatures are more competent at fact-finding than are courts and law made by legislatures is clearer, more reliable, and more representative of the public’s interest than law made by judges.<sup>127</sup> As we have seen, when courts do speak about burdens in public benefits hearings, this default rule is consistently followed, without regard to whether or not in these types of cases it makes sense to place the burden there.

Starting with the expressed value of procedural efficiency, the burden is or ought to be allocated to the party most capable of bearing it to make the litigation more efficient. If this can be done without causing injustice to the other party, courts are willing to allocate the burden of proof to the party with superior access to information.<sup>128</sup> Of course, procedural efficiency is not so compelling that it will trump other, competing policies.<sup>129</sup> In cases of fraud, for example, plaintiffs are routinely required to prove facts about which they were misled in the fraudulent incident.<sup>130</sup> Modern developments in discovery have rendered procedural efficiency a far less compelling justification for

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<sup>124</sup> *Coy v. Superior Court of Contra Costa County*, 373 P.2d 457, 462 (Cal. 1962). This concept is expressed by the legal maxims “*actori incumbit onus probandi*” and “*ei incumbit probatio qui dicit, non qui negat.*” JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW: CIVIL AND COMMON LAW APPROACHES WITH SPECIAL REFERENCE TO THE AMERICAN AND GERMAN LEGAL SYSTEMS 149 (Peter Malanczuk ed., Kluwer Law International 1998).

<sup>125</sup> JOHN MACARTHUR MAGUIRE, EVIDENCE, COMMON SENSE, AND COMMON LAW 179 (1947).

<sup>126</sup> *Lujan v. Colorado State Bd. of Education*, 649 P.2d 1005, 1023 (Colo. 1982) citing *Turner v. Lyon*, 539 P.2d 1241, 1242 (Colo. 1975) (“Every statute is presumed constitutional unless proven beyond a reasonable doubt to be constitutionally invalid.”).

<sup>127</sup> KOKOTT *supra* at 42-51.

<sup>128</sup> FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 344 (1985).

<sup>129</sup> *See e.g.* KOKOTT *supra* at 136.

<sup>130</sup> JAMES, *supra* at 344.

burden allocation. Depositions and readily-accessible public records, for example, afford the parties functionally-equivalent access to evidence in most areas of civil litigation.<sup>131</sup>

However, this ready access to information is not true in the administrative hearing setting. Public assistance appellants have far less ability to access information than does the agency. Discovery is more limited in agency hearings procedure than under the civil discovery rules, making agency documents, files, and witnesses difficult for appellants to obtain. Agencies have discretion to determine by rule whether or not discovery is permissible at all in the adjudicative proceeding, and the hearing officer can decide whether or not to permit depositions or other discovery methods in a particular case.<sup>132</sup> Even if full discovery were permitted, unrepresented low-income litigants may not know what documents and evidence in their own agency files are relevant to their case, so may not understand what to request. Welfare agencies can have volumes of files on a single

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<sup>131</sup> *Id.*

<sup>132</sup> See e.g. Washington APA RCW 34.05.446 (1) The presiding officer may issue subpoenas and may enter protective orders. A subpoena may be issued with like effect by the agency or the attorney of record in whose behalf the witness is required to appear.

(2) An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used.

(3) Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(4) Discovery orders and protective orders entered under this section may be enforced under the provisions of this chapter on civil enforcement of agency action.

(5) Subpoenas issued under this section may be enforced under RCW 34.05.588(1).

(6) The subpoena powers created by this section shall be statewide in effect.

(7) Witnesses in an adjudicatory proceeding shall be paid the same fees and allowances, in the same manner and under the same conditions, as provided for witnesses in the courts of this state by chapter 2.40 RCW and by RCW 5.56.010, except that the agency shall have the power to fix the allowance for meals and lodging in like manner as is provided in RCW 5.56.010 as to courts. The person initiating an adjudicative proceeding or the party requesting issuance of a subpoena shall pay the fees and allowances and the cost of producing records required to be produced by subpoena.

client located in various parts of the agency. Knowing where to look and what to look for may be beyond the skill set of anyone but the experienced poverty law practitioner, let alone a pro se client. Even though it is true that now a great deal of agency information is available and transmittable via computers, the poor have little access to computers, email, cell phones, phones, and other technology that could help alleviate some of the barriers to providing to and receiving information from agencies on their cases.<sup>133</sup>

In contrast, welfare agencies have ready access to all kinds of information about the client, the benefits they want to receive, and the law covering the programs. Agencies can and do obtain tax filings, Social Security records, bank statements, health and work records concerning public assistance recipients with relative ease.

The second category of policies behind allocation of the burden of proof is substantive. Because “[t]he burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side,”<sup>134</sup> courts and legislators decide which party, absent any evidence to the contrary, *ought* to win. Termed another way, the question as to who should bear the burden of proof comes down to “a comparison of the social costs between two potentially wrong decisions.”<sup>135</sup> This is not to suggest that decision makers make this choice explicitly, but burden allocation is inherently based upon a value judgment of the two sides.<sup>136</sup> It is not merely the measure of proof required, then, that reflects the importance of the underlying right at stake. Rather, it is the interplay between the

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<sup>133</sup> Low-income and disabled people may not have the electricity and phone lines to run computers, let alone the appropriate training on how to access information via computer. See (get cites on “Technology Bill of Rights” and “Digital Divide”).

<sup>134</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 358. Citation omitted.

<sup>135</sup> KOKOTT *supra* at 63.

<sup>136</sup> *See id.* at 27.

measure and the allocation of the burden of proof that both indicates and, in many cases, helps to facilitate the law's preferred outcome. Take for example, a case concerning government infringement upon constitutional rights. If viewed along a continuum, the most favored rights would require that the burden of proof be on the government to prove the worthiness of the infringement beyond a reasonable doubt.<sup>137</sup> The least favored rights, then, would require that the burden of proof be on the individual to prove the importance of the right beyond a reasonable doubt.<sup>138</sup> Most cases, of course, lie somewhere in the middle of these extreme positions, with the notable exception being criminal trials. Ultimately, courts appear to be less stringent about requiring the moving party to bear the burden of proving all affirmative allegations when the underlying right is considered important.<sup>139</sup>

A final justification for burden allocation may be termed procedural fairness and is best viewed as an amalgamation of the aforementioned categories. The concern here is that the process of litigation should be fair. Like procedural efficiency, this category is concerned with the process of litigation itself. Like substantive policy, these justifications are concerned with promoting fairness. In order to promote fairness in litigation procedure, one might advocate that the burden of proof lie with the party having superior bargaining power. Again, an example might help to illustrate this point. There are two approaches to allocating the burden of proof in a case involving the enforceability of a liquidated damages clause to an education contract.<sup>140</sup> Put simply, the burden either lies on the party challenging the enforceability of the clause or the party seeking to

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<sup>137</sup> *Id.* at 104.

<sup>138</sup> *See id.* at 122-123.

<sup>139</sup> *See id.* at 98.

<sup>140</sup> Ralph D. Mawdsley, *Enforcement of Liquidated Damages Clauses in Educational Contract Context*, 186 EDUC. L. REP. 587, 592 (2004).

enforce it.<sup>141</sup> The differing approaches are founded upon differing views on how to promote procedural fairness.<sup>142</sup> Courts allocating the burden to the party challenging the agreement view it as part of the contract, meaning that it carries with it a presumption of validity.<sup>143</sup> On the other hand, allocating the burden to the party seeking to enforce the clause may be justified on the grounds that such clauses are often drafted and enforced by parties with superior bargaining power who present the liquidated damages clauses as adhesive agreements.<sup>144</sup> A concern for procedural fairness would dictate that the burden be allocated to the party with superior bargaining power.<sup>145</sup> A second concern for procedural fairness concerns the proof of “negative assertions.”<sup>146</sup>

In some areas of law, courts have refused to accept the basic premise that the party making a claim or raising a defense bears the burden of proving it. It is in these types of cases and substantive areas where courts and commentators are more likely to explore question of the policies behind the allocation of the burden of proof and why they apply to the substantive area at hand<sup>147</sup>.

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 594.

<sup>143</sup> *Id.* at 592.

<sup>144</sup> *Id.* at 594.

<sup>145</sup> *Id.*

<sup>146</sup> Danielle Rubano, *Trade Dress: Who Bear the Burden of Proving or Disproving Functionality in a Section 43(a) Infringement Claim?*, 6 FORDHAM INTELL. PROP. MEDIA & ENT.L.J. 345, 362 (1995).

<sup>147</sup> See e.g. *Santosky v. Kramer*, U.S. In *Santosky* the state brought neglect proceedings in family court to terminate petitioners' rights as natural parents in their three children. State law permitted the family court judge to terminate permanently the natural parent's right in the child if the state supported its allegations by a "fair preponderance of the evidence." The Court ordered a new hearing using the "clear and convincing evidence" standard and suggested that the higher burden of proof would have "both practical and symbolic consequences" in the present case. From Bio's memo on bofp . And, C.M.A. McCauliff, *Burdens of Proof: Degree of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293, 1318-1323 (1982); Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 Nw. U.L. Rev. 492, 496-509 (1988); *Schaffer v. Weast* (Ginsberg dissent).

Schaffer v. Weast: dissent: (G)iven the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information, the risk of non-persuasion ought to fall upon the district." Breyer dissent. All the same and more is true for public assistance applicants/recipients. Add in O'Conner's majority opinion holding otherwise, but based on the full panoply of procedural protections afforded to appealing parents, many of which are not available to public assistance appellants. "Petitioners' most plausible argument is that "(t)he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"". P. 536. In finding that the default rule applies: "(Parents) are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition."

This is simply not the case with regard to public assistance appellants. They are not given the opportunity to look at the evidence in the same way a parent is in sped cases (school district must give the reasons behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. Pub. L. 108-446, 118 Stat. 2718, 20 U.S.C.A. § 1415(c)(2)(B)(i)(I) (Supp. 2005). Nor are they given the ability to have the state pay for an independent expert evaluation at public expense if the appellant disagrees with the evaluation obtained by the agency (see. 34 C.F.R. § 300.502(b)(1) (2005). Finally, Justice O'Conner stated that the *most important*<sup>148</sup> of all the procedural protections in special education administrative hearings that "ensure(s)

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<sup>148</sup> "Finally, and *perhaps most importantly*, parents may recover attorney's fees if they prevail. Weast at 537 (emphasis added).

that the school bears no unique informational advantage” over the parent is that parents may recover attorney’s fees if they prevail at the hearing. 20 U.S.C.A § 14(i)(3)(B). This huge advantage gives parents the ability to access attorney representation when their case has merit, and it encourages the district to settle favorably cases that are not solid. The same is not true for public assistance appellants. There is no attorneys fee statute providing that the state pay fees if it loses. As a result, appellants in this forum are almost entirely unrepresented, and the government has no incentive to settle cases that are shaky on the facts or law. These large distinctions from special education cases make the case for a favorable burden even stronger in the public assistance arena.

why burdens are allocated in particular ways generally: policy behind burdens assignments

three policies: (Deidra research memo)

1. procedural efficiency: allocate the burden to the person most capable of bearing it, who has the best access to information (copyright infringement cases).
  2. substantive: who ought to win! A comparison of the social costs between two potentially wrong decisions. What is the law’s preferred outcome in the event that no evidence were produced by either side? The importance of the underlying right determines standard of proof and assignment of burden. Justice and humanity dictate. societal gain/loss; allocation of risk
  3. procedural fairness: the process of litigation should be fair. Burden should lie with the party having superior bargaining power. See enforcement of liquidated damages clauses. Burden should be on who is asserting a charge of serious wrongdoing.
- b. Why/how 3 general reasons apply in pa context supporting burden placement on the state.
1. look at substantive reasons: purposes of public assistance and how furthered.
  2. allocation of risks of loss: more fair, given purposes, to put risk of loss on society rather than on claimant.

### 3. State access to information much greater

THIS IS THE SECTION LOOKING AT OTHER COMPARABLE AREAS OF LAW WHERE THE BURDEN IS ON THE STATE:

One might ask, why should public assistance administrative hearings be treated differently with regard to the burdens of proof than other administrative hearings cases and civil cases that involve important legal rights.

In fact, there are or were several administrative hearing cases where the burden of proof is placed on the government or government equivalent, due to precisely the same policy considerations just described. In the Black Lung cases, prior to the decision in *Greenwich Collieries*, courts recognized the important judicial policy that “all doubtful questions are to be resolved in favor of the injured employee ... in order to place the burden of possible error on the employer who is better able to bear it.”<sup>149</sup>

In Veterans benefits cases, Congress has provided statutory protection for Veterans who are administratively appealing denials of claims for income and health benefits. “Doubts in veteran’s benefits adjudications should be resolved in favor of the claimant.”<sup>150</sup>

Special education cases, where parents are challenging school district decisions on what educational services will be provided to children with disabilities, are similar in complexity and critical importance of these services to the lives of recipients. (Put here

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<sup>149</sup> *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1<sup>st</sup> cir. 1978). See also, *Jones v. Director, Office of Workers’ Compensation Programs, DOL*, 977 F.2d 1106, 1109 (7<sup>th</sup> cir. 1992) (true doubt rule “places the burden of possible error on those best able to bear it” i.e. employers).

<sup>150</sup> 38 U.S.C. sec. 5107 (1988 ed., Supp.IV); 38 C.F.R. sec. 3.102 (1993). (check these cites to make sure this is still the case post-*Colliers* – does the APA apply to Vets appeals?)

the policy considerations in Weast case, and show why PA cases are even more difficult and risky in loss, and provide fewer protections than sped cases, in particular that there are no attorney fees available to prevailing party.) (put here: In these cases, even after the Weast decision, the states are allowed to assign the burden in sped hearings. Many states, based on policy considerations, require that the school district bear the burden of persuasion in all cases. Cites☺

Why are more than just the usual protections available in civil courts required here? For example, child custody cases present important issues for clients involving who has and cares for children. Yet, I am not advocating that burdens be shifted or additional protections be given to parents seeking custody. However, this civil area is distinguishable from the public assistance administrative hearing process in that the litigants, typically the parents of the child, are theoretically on equal footing in the court proceeding. There is no inherent imbalance of resources and power in this type of litigation that is present when the state is on the other side of the issue, which is the case for all public assistance hearings.

Public assistance administrative hearing cases are more comparable to other types of cases where the burden has been placed on the state in a way similar to what I am proposing here: criminal cases, civil dependencies, civil commitments, and public housing.

The deprivation of income, food, and health benefits resulting from a denial or termination of public assistance rivals the devastation a criminal defendant faces from the potential loss of freedom from imprisonment. Compare the typical criminal misdemeanor case with that of a denial of medical/income benefits. A criminal defendant

charged with shoplifting, minor theft, simple assault, or minor drug possession is likely to suffer minimal consequences if convicted. Often, little or no jail time is at stake, with no more than one to two days possible. Or, the defendant faces only the possibility of a fine, and no jail time. Even if a jail sentence occurs, that sentence is likely suspended if the defendant does rehabilitation in the form of substance abuse counseling, anger management, or community service. Other potential outcomes of a criminal misdemeanor charge include a suspension of drivers license, probation reporting, limits on travel, orders of protection/ restraining orders prohibiting the defendant from going to certain places or seeing certain people.

Even with minimal incarceration, some would argue that at least the criminal defendant is provided with food, shelter, clothing, and basic healthcare benefits. On the other hand, the denied public assistance applicant loses these basic needs when the state determines ineligibility. *(Stephanie is getting me more information on the consequences of a criminal misdemeanor conviction).*

Yet, in hearings to determine their outcome, criminal misdemeanor defendants are given a vast array of protections, while public assistance claimants in the administrative hearing system are given far less than even general civil litigants receive in state or federal court trials.<sup>151</sup> Based on constitutional guarantees, criminal defendants have the additional rights to free appointed counsel when indigent<sup>152</sup>, the right to a speedy trial

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<sup>151</sup> General civil litigants have all the evidentiary protections given in the Evidentiary Rules, for example, inadmissibility of hearsay (ER 101), inadmissibility of relevant evidence when probative value is outweighed by prejudice (ER 404). The administrative hearing appellant is given no such guarantees. Hearsay is admissible and highly prejudicial evidence is admissible if it is the kind of evidence used by a “reasonably prudent person in the conduct of his/her affairs.” Washington Administrative Procedure Act, RCW 34.05.

<sup>152</sup> Gideon v. Wainwright, cite, and U.S. Constitution, Sixth Amendment “right to have assistance of counsel of his defense.”; Cook 3<sup>rd</sup> Edition, Vol.2. Public assistance appellants have no guaranteed right to counsel, and generally have no representation in the administrative hearing setting. Some argue that the

<sup>153</sup>, the right to trial by a jury of peers <sup>154</sup>, the right against double jeopardy (thus the state has no appeal rights when the defendant wins at trial) <sup>155</sup>, the right to confront witnesses (thus hearsay is inadmissible),<sup>156</sup> and significant protections in the assignment of the burden of proof.<sup>157</sup>

The rights afforded criminal defendants with regard to the assignment of the burden of proof are significant, and have perhaps the greatest impact on leading to a favorable outcome for defendants in criminal trials. There are several elements to the burden that are favorable to defendants. First, the state bears the burden of proving each and every element of the crime for which the defendant is accused. The level of proof the state must meet for each element is the highest in law: beyond a reasonable doubt. On the other hand, the defendant does not have to put on any case at all, and will prevail if the state has failed to prove each element of the crime beyond a reasonable doubt. Finally and perhaps most critically, the defendant is given a presumption of innocence, and is considered innocent until proven guilty by the state.

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right to counsel should be afforded indigent civil litigants in certain circumstances. See Civil Gideon articles. However, this argument has yet to be made for appellants in the administrative hearing process.

<sup>153</sup> Cite for speedy trial. Administrative public assistance appellants are given certain guarantees to a quick hearing and decision, but this time limit is difficult to enforce. (cite statute, regs with time limits).

Appellants frequently must wait for long periods to have hearings scheduled and then to receive the written decisions, without recourse when timeframes are violated. Cites.

<sup>154</sup> Cite for jury trial. Administrative hearing appellants have no right to trial by jury or to have their case heard by a peer. Cites.

<sup>155</sup> Cite for double jeopardy – U.S. Constitution, Fifth Amendment “nor shall any person be subject for the same offense to be twice put in jeopardy.” *Crist v. Beretz*, 437 U.S. 28 ( ); *Green v. U.S.*, 355 U.S. 184 ( ); *U.S. v. Perez*, 22 U.S. 579 ( ); *Forrest G. Alogna, Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction*, 86 Cornell L. Rev. 1131 ( ); *Cook* 3<sup>rd</sup> Edition Vol. 2. Unlike criminal defendants, public assistance appellants who prevail in their initial administrative decisions can have their decisions appealed by the state to an internal agency decision maker. Cites.

<sup>156</sup> U.S. Constitution, Sixth Amendment, “right to be confronted with the witnesses against him...”; *John Douglas, Hearsay and Criminal Discovery*, 68 Fordham L. Rev. 2097 (2000); *Coy v. Iowa*; *Hopt v. Utah*; *People v. Insogna*. In administrative hearings, hearsay is admissible. Cites.

<sup>157</sup> Like appellants in public assistance hearings, criminal defendants also have the

Behind these constitutional guarantees regarding the state's heavy burden in the criminal arena are policy reasons for these guarantees. Why do we have such a high standard of proof and a presumption of innocence? Surprisingly, there is not a lot written on the policy reasons behind the favorable criminal burden, perhaps because these concepts are so deeply imbedded in our jurisprudence and culture that we do not question them.

Central to the US criminal judicial system is the presumption of innocence. The belief is that it is far worse to convict an innocent person than let a guilty one go free.<sup>158</sup> As a natural result, the state carries the burden of proving an individual's guilt beyond a reasonable doubt, which is constitutionally required. Society's protection of innocence in the criminal arena stems not only from the chance an individual will lose his or her liberty, a right of great value in the US, but also the stigma which is attached to crime. The criminal code is society's manifestation and judgment as to which behaviors should be condemned and punished. Individuals should be free from erroneous convictions when their behavior has either not been criminal, as decided by the legislature, or their behavior is viewed as excusable or justified. However, some states allow for the burden to shift to the defendant when it raises an affirmative defense, requiring the defendant to prove the presence of the defense. This shift is justified on the grounds that the risk of false claims far outweighs the potential for innocent to be wrongly accused and convicted. Generally, though, it is viewed to be a gross injustice to condemn and punish a person who has not violated the norms of society, as expressed by the criminal code.<sup>159</sup>

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<sup>158</sup> Voltaire wrote, "It is better to risk saving a guilty man than to condemn an innocent one."

<sup>159</sup> Scott E. Sundby. *The Reasonable Doubt Rule and the Meaning of Innocence*. 40 *Hastings L.J.* 457. (March, 1989)

The purpose for having such a stringent standard falling on the state in criminal cases is rooted in the belief that no person should be unjustly prosecuted by the government and should be free from being found guilty when they have done nothing wrong. The concern for loss of liberty and the stigma connected with a criminal charge are the driving force behind placing the burden on the state. Criminal law is the moral force manifesting the norms of society, and being charged and convicted carries with it the stigma of being marked as a deviant. Furthermore the burden maintains public confidence in the justice system.<sup>160</sup>

The mark of a civilized society is avoiding the conviction of the innocent. It is a fundamental value of our judicial system, as well as the country at large to not convict the innocent. The desire is to protect each person from the wrongful loss of liberty and the stigma attached to criminal sanctions. Too assure that such an injustice does not occur, society imposes the risk of error solely on itself by requiring prosecutors prove each element beyond a reasonable doubt.<sup>161</sup>

Furthermore, the criminal burden, as well as the host of other protections given the accused, is rooted in the belief that the huge power of the state in terms of resources, police, etc. over the minimal power of the individual must be balanced out so that the state's power is not abused....

Many of these same policy reasons that drive the need for the constitutional protections given to criminal defendants exist with equal vigor in the public assistance

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<sup>160</sup> Leslie J. Harris. Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness. 77 J. Crim. L & Criminology 308, (Summer, 1986).

<sup>161</sup> Lawrence M. Solan. Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt. 78 Tex. L Rev 105 (1999).

administrative hearing setting. Income, food, and health benefits are critical to human dignity and survival. The loss or limitation of these benefits can lead to worse outcomes than imprisonment. Shouldn't society err on the side of giving the benefit to the possibly ineligible just as we err on the side of letting the guilty go free? Isn't the denial of basic needs to one actually eligible person potentially the moral equivalent of wrongly convicting a person of a criminal misdemeanor?

Add here why the right to food, shelter, clothing and healthcare is a right integral to the humanity of a person, just as the right to freedom from incarceration is. Maybe talk about healthcare in countries that provide universal healthcare, and *Goldberg v. Kelly* cases, and *Mathews v. Eldridge*. (this is to deal with Stephanie's concerns in email).

In a civil dependency case where the state is attempting to remove children from the home of their parents. In fact, in dependency actions, we do provide significantly more rights and protections to parents than in the general civil system, precisely because of the critical rights of parents and children at stake, and because of the power of the state in the proceeding. In dependency actions, parents have the right to counsel provided at the state's expense if they cannot afford counsel.<sup>162</sup> Also, the burden of proof is placed on the state to show the parents are unfit and that removal from the home is in the best interest of the child.<sup>163</sup> The level of proof is higher than in other civil proceedings as well. For example, when the state wants to place a child in shelter care for a period of

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<sup>162</sup> See RCW 13.34.062(2), granting a right to counsel to parents who cannot afford counsel at the expense of the state.

<sup>163</sup> RCW 13.34.180.

time, it carries the burden of proof, but only by a preponderance of the evidence.<sup>164</sup> However, when the state seeks to terminate parental rights, the level of proof is raised to “clear, cogent, and convincing evidence.”<sup>165</sup> In this civil proceeding, we have imported the right to counsel and the burden of proof close to that in the criminal system because the right to keep children in parental care is so basic and integral to our idea of family.<sup>166</sup> (cites).

The denial or termination of public assistance can be comparable to the threat of removal of children, or to the placement of children in shelter care, and thus similar protections should be afforded individuals in the hearing system. Children who cannot be cared for by parents because they do not have the financial resources to feed, clothe, provide shelter and health care to their children face the risk of losing them. Obtaining and keeping public assistance benefits could be the difference between keeping children at home or having them become dependents of the state. In this sense, public assistance and child welfare and dependency are inexorably linked. Without assistance, families can cycle into the juvenile justice system and lose custody of their children because they cannot provide financial support. Yet, it is only at that late point that parents get the benefit of a right to counsel and a burden and level of proof that favors them against the state. If the state carried the burden of proving ineligibility for assistance, perhaps fewer families would lose benefits and more would be able to provide for their children. (going on a rant here???)

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<sup>164</sup> RCW 13.34.110.

<sup>165</sup> RCW 13.34.180.

<sup>166</sup> RCW 13.34.020 intent section of the dependency statute discusses the rights of families and children...

(Other ideas of similar types of cases?) Another civil area comparable to public assistance administrative hearings is civil commitment hearings.<sup>167</sup> Here again, when the state is attempting to force treatment or hospitalization on a person it considers to be a danger to self or others, or unable to care for self, significant procedural protections are given to the defendant. Because of the potential of incarceration and violation of due process, defendants are given the right to counsel provided at state expense,<sup>168</sup> and the state bears the burden of proving the person is committable by clear, cogent and convincing evidence (check this out).

Perhaps the most closely comparable civil proceeding involving critical rights is that of a Guardianship. Although in this action it is not the state trying to take away rights from the “alleged incapacitated person” but rather a person, it is comparable in that a guardianship can involve the loss of significant rights by the alleged incapacitated person, including the right to make decisions about where to live and health care, the right to contract, the right to marry, access to income and assets, etc. Here, the person against whom a guardianship is sought has the right to counsel, but at the person’s own expense, and the burden is on the petitioner to prove that the person is both incapacitated and that there is no less restrictive way to deal with the incapacity than to take away rights. (cites) more?

When renters are in the position of losing housing through eviction, they are given additional protections in statute by placing the burden of proving the elements of eviction are met on the landlord. For evictions from public and often private housing too, we require landlords to prove the eviction is “for cause”. The burden is on the landlord to

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<sup>167</sup> See RCW 71.05.010 et seq. Involuntary Treatment Act.

<sup>168</sup> RCW 71.05.460 right to counsel.

prove cause before taking away housing. This is because housing, and in particular subsidized housing, is deemed such an important benefit that we do not want to easily remove people from their homes without requiring the landlord to meet a certain level of proof first. (cites to subsidized housing statutes and regs, and private unlawful detainer statutes, municipal good cause ordinances. ) Here, the state is not on the other side, but the right is so critical that we grant tenants these additional protections. Again, it is difficult to distinguish out why tenants deserve these extra protections from eviction while public entitlement appellants do not. (This all deals with Stephanie's concerns in her email as to why this area should be any different than other civil areas of need.)

How would these changes in the burdens of proof, presumption of eligibility, and deference to legal interpretations favorable to appellants be accomplished? Perhaps the best way to accomplish this change on a nationwide basis is for Congress to pass legislation amending the Social Security Act titles 16 and 19, requiring this new burden of proof in all "needs based" entitlement/welfare reform programs. In that way, agencies regulating the TANF, SSI, and Medicaid programs would all have the same burdens of developing evidence of eligibility and responding to hearing decisions interpreting its regulations. The federal Food Stamp statute would have to be similarly amended to take in that needs based program.

Next, this change in the burdens of proof and presumption of eligibility could be implemented by amendments to the state and federal Administrative Procedure Acts to create an exception to the rule that "the burden of demonstrating the invalidity of agency

action is on the party asserting the invalidity.”<sup>169</sup> An exception can be made to this requirement only for applicants and recipients of “needs based” public assistance benefits. The current burdens would remain in place for all other agencies that administer programs that do not require a finding of financial need to be eligible. In addition all state and federal agency statutes and regulations dealing with fair hearings involving eligibility for public assistance benefits could be amended to incorporate the new burdens of proof in application and termination cases.

#### **VI. The effect of putting the burdens on the state in all instances.**

What would the world of public benefits look like if we changed the burden of proof in all public benefits cases and required the state and federal government to show in every case why the applicant or recipient does not meet the eligibility requirements? Would the floodgates open and all who applied be winning their benefits on appeal? Would state and federal budgets be busted because so many more people would be found eligible and so many more state workers would be required to document eligibility requirements?

I believe the answer to each of these questions is no. Using the criminal system as an example, even with so high level of proof required on prosecutors, the vast majority of people charged by the state with crimes end up with convictions either after trial or through the plea bargaining process. (*Stephanie: can we get figures on # of charged who are convicted at trial, or who plea bargain*). This is true even though other significant

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<sup>169</sup> RCW 34.05.570(1) and Fed APA cite.

protections are given to those accused of crimes, including the right to attorney representation, the right to trial by jury, and the burden of persuasion being “beyond a reasonable doubt.” There is no reason to think that a change in burden will result in any significant increase in public assistance applications or appeals of denials.

Rather, what would occur is that in the closer cases more clients would prevail at hearings and win benefits rather than the other way around. If the state found that too many people were winning at hearing, it would either have to change eligibility rules to narrow the requirements, or put on a better case through more accurate factual development and persuasive legal analysis. This is a more fair and appropriate method of allocating scarce resources than cutting off of benefits the most vulnerable and least able to argue a case at hearing.

There are additional good policy and fairness reasons for placing the burden squarely on the state. First, placing the burden on the state requires it to do its homework and increases the quality of agency decision making. Instead of relying on the inability of its clients to play the hearing game, the state will actually have to prove each and every element of eligibility and ineligibility in every case. This means that greater care will be taken with every client case, resulting in better defended and articulated denials of benefits as well as findings of eligibility. In fact, there may be fewer appeals of denials by clients because they will better understand why they were denied and what evidence was used by the state in making its determination. When an agency has the difficult task of determining eligibility for life saving benefits, the quality of its decisions should be tested in a rigorous way. Requiring a higher level of proof is a form of quality control of agency decision making that is appropriate in cases involving such critical benefits.

If eligibility information is better and more reliable when developed by the state in proving its cases, then law makers and agency managers will have more accurate statistics about who is and is not meeting eligibility requirements. The current system relies instead on the ability of applicants to muster eligibility information that may or may not be accurate depending on the resourcefulness of the particular client, not necessarily the actual level of need of the client. In fact, the irony is that the more in need the person is, the less physically and mentally able he may be to make the case for eligibility by mustering the financial and medical evidence needed to prove eligibility. Accurate numbers are important when policy and budget decisions are being made about who should be allowed these benefits. Policy makers should not be basing their decisions on the ability or inability of beneficiaries of benefits to make their case but rather on accurate figures of real eligibility done by the agency in charge of public assistance programs.

In a strange twist on this theory which actually proves my point here, the Washington State legislature during the 2003 session changed the burden of proof in the state funded General Assistance program hearings as a way of cutting the program budget. The GA-U program provides income and medical benefits to low income single people who are disabled, but do not qualify for Social Security or SSI. In order to save money, the legislature changed the burden of proof in administrative hearings for clients who have been terminated from the GA-U benefit. “GA-U clients will now bear the burden of proof to demonstrate they remain medically or mentally incapacitated and continue to be eligible for these benefits. Those who don’t will be disenrolled. Savings:

\$7.1 million.”<sup>170</sup> By requiring clients who have already been determined to meet the eligibility requirements for GAU to continue to prove eligibility, the State knows that many will not be able to meet the continuing burden. Thus, those most in need but least capable of putting on a case will end up being cut from the program, not because they are no longer disabled or low-income, but because they do not have the skills to represent themselves in the process. This is a cynical and unfair method of cutting a budget by putting up further obstacles to proving eligibility to those already at a steep disadvantage. I am proposing the opposite -- that we make the system fair in determining eligibility for benefits, and base policy decisions on real information about who is and is not in fact eligible, and who we determine who should and should not receive these benefits in a transparent way.

Placing the burden of proof on the state requires it to access and use eligibility information on the client that it has uniquely available to it. Having accurate information on finances and medical conditions allows ALJs to make informed decisions based on the reality of the clients’ situation, not on the relative abilities of clients to muster the facts in a hearing.

Requiring the state to prove its case in every instance will result in the agencies writing better and more clearly articulated regulations. If agency rules are unclear in particular case, they should be interpreted against the drafter and in favor of eligibility. In this way, if some ALJs are frequently wrongly interpreting Department rules from the perspective of the agency, then, instead of relying on a different ALJ in the next case or the agency’s internal review to overturn the decision, the state would be required to re-

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<sup>170</sup> [www.dshs.wa.gov/mediareleases/2003/pr03190.shtml](http://www.dshs.wa.gov/mediareleases/2003/pr03190.shtml). A list of major Medicaid budget changes and the timing of implementation.

write the rule to have it say what it means. This requires the state to respond to ALJ decisions it dislikes by writing regulations that clarify the law and their interpretation of it, rather than affidaviting judges they dislike. Clients would get the benefit of more consistent interpretations of regulations, and more understandable eligibility requirements in the process.

The likelihood is that, in fact, more appeals of public assistance denials and terminations would be settled by the agency because, if the case is weak, they know they will likely lose at the hearing. More cases would also be settled by the client, who would have access to better written rules and better developed evidence provided by the state. The burden of proof on the state allows for a higher use of the administrative hearing system: there will be fewer hearings, more developed factual records and legal arguments, and more cases where there is a real dispute about the facts or the law.

#### VII. Social Justice Requires this

There is a strong debate going on in the legal community about the best way to provide for justice for litigants who cannot afford counsel in their civil disputes. Some argue that the best way of resolving this problem is to provide attorney representation to all who need counsel. Those who favor a “civil Gideon” believe that only attorney representation will level the playing field for low-income litigants facing eviction, loss of custody, civil rights violations, etc. Others believe that counsel is not the solution. They argue that market forces allow those with money and power to buy better representation and tactics that do not serve justice, even when the low-income client is provided with a lawyer. Instead, some argue that court procedures need to be simplified and standardized making it easier for pro se litigants to navigate the system alone. They favor increased

use of pro se projects, do-it-yourself divorce kits, courthouse facilitators, self-help plus forms, etc., postulating that civil Gideon will never happen or is not the best solution. Still others argue that increasing funding for legal services programs, pro bono programs, requiring attorneys to do pro bono work, is the more cost-effective method of providing representation. Finally, some argue that the judge in civil cases where one party is pro se should play a more prominent “active umpire” in the dispute to level the playing field.